

No. 11885

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE TUG "ROCONA," JOHNSON WESTERN
COMPANY and CASE CONNOLLY COMPANY,
Appellants,

vs.

GUY F. ATKINSON COMPANY,
Appellee.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

MAY 17 1949

PAUL P. O'BRIEN,

CLERK

No. 11885

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE TUG "ROCONA," JOHNSON WESTERN
COMPANY and CASE CONNOLLY COMPANY,
Appellants,

vs.

GUY F. ATKINSON COMPANY,
Appellee.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer to Libel.....	10
Appeal:	
Citation on	2
Notice of	28
Order Allowing	30
Petition for	29
Statement of Points on Which Appellants Intend to Rely on (Circuit Court).....	217
Stipulation and Order re Use of Original Exhibits on (Circuit Court).....	218
Assignment of Errors.....	31
Certificate of Clerk.....	36
Citation on Appeal.....	2
Decree and Order of Reference, Interlocutory.....	27
Findings of Fact and Conclusions of Law.....	21
Libel in Rem and in Personam.....	4
Names and Addresses of Proctors.....	1
Notice of Appeal.....	28
Order Allowing Appeal.....	30
Order re Use of Original Exhibits on Appeal.....	219
Petition for Appeal.....	29
Pretrial Stipulation	16

Reporter's Transcript of Proceedings.....	37
Libelant's Exhibits (See Index to Exhibits)	
Respondents' Exhibits (See Index to Exhibits)	
Testimony on Behalf of Libelant:	
Bach, Soren K.—	
Direct examination	72
Cross-examination	79
Jackson, F. C.—	
Direct examination	40
Cross-examination	60
Redirect examination	71
Raimer, Edward M.—	
Direct examination	83
Scheibe, Fritz A.—	
Direct examination	104
Cross-examination	111
Redirect examination	116
Recross-examination	123
Testimony on Behalf of Respondents:	
Gentle, Thomas J.—	
Direct examination	188
Cross-examination	200
Reeves, E. A.—	
Direct examination	126
Cross-examination	137
Redirect examination	145
Tomasic, Rudy—	
Direct examination	148
Cross-examination	167
Redirect examination	187
Recross-examination	187

Page

Statement of Points on Which Appellants Intend to Rely on Appeal (Circuit Court).....	217
Stipulation re Stay of Proceedings, etc.....	34
Stipulation and Order re Use of Original Exhibits on Appeal (Circuit Court).....	218

INDEX TO EXHIBITS

Libelant's Exhibits:

No.	Page
1. Diagram (In Evidence).....	46
2. Drawing made by Soren K. Bach (In Evidence)	76
3. Drawing made by Edward M. Raimer (In Evidence)	77
4. Chart No. 5147 (In Evidence).....	147
5. Diagram drawn by Rudy Tomasic (In Evidence)	176

Respondents' Exhibits:

A. Piece of paper showing position of indentation on bottom of barge (In Evidence).....	82
B. Three log sheets bearing serial numbers 1360, 1361 and 1362 (In Evidence).....	147

NAMES AND ADDRESSES OF PROCTORS:

For Appellants:

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

1007 Title Guarantee Building,

411 West Fifth Street

Los Angeles 13, Calif.

For Appellee:

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

704 Roosevelt Building

Los Angeles 14, Calif. [1*]



NAMES AND ADDRESSES OF PROCTORS:

For Appellants:

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

1007 Title Guarantee Building,
411 West Fifth Street
Los Angeles 13, Calif.

For Appellee:

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

704 Roosevelt Building
Los Angeles 14, Calif. [1*]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,
Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,
Claimant.

CITATION ON APPEAL

To Guy F. Atkinson Company, a Corporation, and
Messrs. McCutchen, Thomas, Matthew, Griffiths and
Greene, Harold A. Black, and George E. Toner,
Esquires, Its Attorneys, Greetings:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals for the Ninth
Circuit, to be held at the City of San Francisco, in the
State of California, on the 29 day of March, 1948, pur-
suant to an Order Allowing Appeal, filed on February 18,
1948, in the Clerk's Office of the District Court of the
United States, in and for the Southern District of Cali-
fornia, Central Division, in that certain cause numbered

Admiralty No. 6936-B, wherein the Tug Rocona, etc., Johnson Western Company, [2] a corporation, and Case Connolly Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the Interlocutory Decree and Order of Reference in the said appeal mentioned, should not be reversed and vacated, and why you should not do and receive what may appertain to justice in the premises.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 20th day of February, 1948, and of the Independence of the United States, the 172nd.

PAUL J. McCORMICK

United States District Judge for the Southern
District of California

Service of a copy of the foregoing Citation on Appeal is acknowledged this 19th day of February, 1948, together with copy each of: Petition for Appeal, Assignment of Errors, and Order Allowing Appeal. McCutchen, Thomas, Matthew, Griffiths and Greene, Harold A. Black, George E. Toner, by Harold A. Black, Proctors for Libelant.

[Endorsed]: Filed Feb. 20, 1948. Edmund L. Smith, Clerk. [3]

by virtue of the terms of said contract, the Case Construction Company agreed to tow said Barge from Catalina Island to Los Angeles Harbor in an efficient and careful manner, to moor said barge at one of several mooring floats at said harbor or to transfer said barge to a harbor tug.

V.

Pursuant to the terms of said contract, on March 31, 1945, libelant delivered said Barge No. 4414 to said Tug Rocona at Catalina Island, said barge then and there being in a sound and seaworthy condition and loaded with 879 tons of rock. Said Case Construction Company, by its employees, agents and servants, acting within the scope of their employment took sole possession, charge, custody and control of said barge and caused the respondent Tug Rocona to be put in tow thereof. On April 1, 1945, said Barge No. 4414 was redelivered to libelant at a mooring float in Los Angeles Harbor in a sinking and unseaworthy condition; a large hole had been punched in her bottom approximately 20 feet aft of the bow rake and about 5 feet from the starboard side; more specifically as was subsequently discovered, planks numbers 22 and 23 from the bow rake were stove in, and said barge was taking water faster than could be handled by her pumps. To prevent said barge from sinking then and there with its load of rock, libelant was compelled to and did cause said barge to be towed about the harbor in order to discharge said load of stone overboard.

VI.

The reasonable cost of repairs, necessary to restore said Barge No. 4414 to a seaworthy condition, amounted to \$2,308.62. Repairs [6] consisted of replacing the planks numbers 22 and 23 to approved butts, together with the

necessary caulking and painting. As a result of said delivery of said Barge No. 4414, in an unseaworthy and sinking condition, libelant sustained a loss of 808.86 tons of rock to a value of \$1,455.95. In order to prevent said barge from sinking with its entire load of rock, libelant was compelled to and did expend the sum of \$177.03 for tug hire. As a proximate result of said repairs said barge was detained and unable to engage in her usual service for a period of four days, as a result of which detention time libelant suffered a loss of \$133.33. As a further result of said damage, libelant was required to expend the sum of \$80.00 for surveyor's fee; libelant has accordingly suffered a total loss as a direct and proximate result of said delivery by respondent tug of said Barge No. 4414 in a damaged, sinking and unseaworthy condition, of \$4,154.93, in which amount libelant prays reparation with interest.

VII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

As a Further, Separate, Distinct and Second Cause of Action, libelant alleges:

VIII.

Libelant repeats, reiterates and incorporates by reference as if fully set forth herein, Articles numbered I, II, III and IV of this answer.

IX.

Under and by virtue of said contract, respondent Tug ROCONA and the employees, agents and servants of said Case Construction Company, had a duty to use due care and caution in the towage and [7] mooring of said Barge

No. 4414, and to exercise due and proper seamanship in the towing and mooring of said Barge No. 4414.

X.

Libelant repeats, reiterates and incorporates by reference as if fully set forth herein, Articles numbered V and VI of this answer.

XI.

Said employees, agents and servants of Case Construction Company and respondent Tug Rocona were negligent and careless in that said towing and mooring of said barge were conducted in an improper, careless and improvident manner in that said barge upon being moored was allowed to override and run above the same mooring float when the mooring pendant of said float was affixed to the mooring bitt of the barge. When the forward motion of the barge caused the mooring line and the anchor chain of the float to become taut, the mooring float overturned below the said barge and a "U" bolt located at approximately the center of the mooring float was punched through the bottom of the barge. Said employees of the Case Construction Company and said respondent tug Rocona were negligent in that:

- (1) Said vessel was not in charge of competent persons;
- (2) Said persons did not have proper or efficient officers or crew properly stationed and attending to their duties;
- (3) Said vessel was negligently and carelessly maneuvered so as to cause the bow of the said Barge No. 4414 to override the said mooring float;
- (4) The forward motion of said Barge No. 4414 was not stopped before the bow of said barge came up to said mooring float;

- (5) They were negligent in other and further particulars than those hereinbefore set forth, of which libelant is not at present advised but as to which libelant begs leave [8] to offer proof as and when advised and to amend this libel accordingly.

As a direct and proximate result of said negligence and carelessness of said respondent, Tug Rocona and the employees, servants and agents of Case Construction Company and said Tug Rocona, libelant has been damaged in the sum of \$4,154.93 for which sum libelant prays reparation with interest.

Wherefore Libelant Prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said Tug Rocona, her engines, tackle, apparel and furniture, etc., and that all persons having any interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid; that this court will hear the evidence which the libelant will adduce in support of the allegations of the libel and will enter a decree in favor of the libelant for the above-mentioned damages and will order the same to be paid and satisfied out of the said proceeds of the Tug Rocona, together with interest and with the costs of the libelant and will otherwise right and justice administer in the premises.

Dated May 4, 1947.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER [9]

[Verified.]

[Endorsed]: Filed May 6, 1947. Edmund L. Smith,
Clerk. [10]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,
Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,
Claimant.

ANSWER TO LIBEL

Come now the respondent, Johnson Western Company, a corporation, answering for itself, and the claimant herein, Case Connolly Company, a corporation, answering on behalf of the Tug "Rocona," her engines, tackle, apparel and furniture, and admit, deny and allege:

I.

Admit the allegations set forth in paragraph I of the libel on file herein.

II.

Allege that they or either of them do not have sufficient [11] information or belief to enable them to answer the allegations contained in paragraph II of said libel, and basing their denial on said lack of information and belief, deny generally and specifically, each and every, the allegations contained in said paragraph II, except that

these answering parties admit that Barge No. 4414 was hauling rock from Catalina Island to Los Angeles Harbor at the time of the occurrence alleged in said libel.

III.

Answering the allegations contained in paragraph III of said libel, deny generally and specifically that at the time of the occurrence of the event on which said libel is based, or at any other time, or at all, the Tug "Rocona" was owned by the Case Construction Company, a co-partnership, and further deny generally and specifically that Case Construction Company, a co-partnership has or did at any time, or at all, transfer or purport to transfer the said Tug "Rocona" to respondent, Johnson Western Company, a corporation, and in the foregoing connection these answering parties allege that the Tug "Rocona" is now and was at all times herein mentioned, and at all times referred to in said libel, and particularly on April 1, 1945, owned by the claimant, Case Connolly Company, a corporation; however, said Tug "Rocona" was during March and April 1945, and specifically at the time of the alleged occurrences referred to in said libel, operated and managed by Case Construction Company, a co-partnership. The balance of the allegations contained in paragraph III of said libel not hereinabove specifically denied in this paragraph of this Answer, are admitted.

IV.

Admit the allegations contained in paragraph IV of said libel, and allege that Case Construction Company properly, efficiently, in a careful manner and in full compliance with its engagement, safely towed and safely moored Barge No. 4414. [12]

V.

Deny generally and specifically, each and every, the allegations contained in paragraph V of said libel, and allege that the facts and circumstances of the occurrences of March 31 and April 1, 1945 as purported and attempted to be alleged in paragraph V of said libel are incorrect and untrue, and that the true facts and circumstances are as follows, to wit:

On March 31, 1945 at Catalina Island, California, libelant, through its authorized agents and employees, delivered Barge No. 4414 fully loaded with rock to the Tug "Rocona" for the purpose of towing said barge to Los Angeles Harbor. Said barge had been loaded previously with said rock, by libelant, in an improper and unsafe manner and when said barge was delivered to the Tug "Rocona" for said towing purposes it was not in a safe, sound, or seaworthy condition in that it was heavy by the stern with approximately two to three feet of freeboard at the bow, and six to eight inches of freeboard at the stern. Nevertheless, the Tug "Rocona," through her master, undertook to and did tow Barge No. 4414 from Catalina Island, California to Los Angeles, California without untoward event. At about the hour of 12:00 midnight, March 31-April 1, 1945 the Tug "Rocona," through her master and crew, caused said Barge No. 4414 to be moored at Los Angeles Harbor, California, in a safe, proper and seamanlike manner to a certain mooring block or float provided by and the property of the libelant. Having completed her towing engagement safely and properly and having moored the tow (said Barge No. 4414) said Tug "Rocona" departed. At the time of and during the mooring of said barge to the mooring facility provided for the purpose by libelant, said

mooring facility appeared proper, safe and useful for its intended purpose. At a time precisely unknown to these answering parties, but subsequent to the completion of the mooring of said barge as aforesaid, certain damage occurred to the bottom of said Barge No. 4414, in that planks Nos. 22 and 23 were stove in at a point [13] approximately 20 feet aft of the forward rake, and approximately five feet inboard from the starboard side. These answering parties are informed and believe, and upon such information and belief allege that the cause of said injury as aforesaid to Barge No. 4414 was caused and occurred by virtue of the ebb and flow, rise and fall of the sea lifting or impelling the said Barge No. 4414 up, over and upon the "U" bolt affixed to and part and parcel of the said mooring facility. Said mooring facility was anchored to the floor of Los Angeles Harbor by an anchor chain that was too short, and by reason of that condition the floating portion of said mooring was, at times of high or medium tide, submerged or partially submerged, thus making it inevitable that a heavy laden craft moored thereto would during time of high or medium tide be hoisted or impelled upon and over and on top of the floating portion of said mooring.

VI.

Answering the allegations contained in paragraph VI of said libel, these answering parties allege that they or either of them do not have sufficient information or belief with which to answer the allegations contained in said paragraph VI, and basing their denial on said lack of information and belief, deny generally and specifically, each and every, the allegations contained in said paragraph VI.

VII.

Deny generally and specifically, each and every, the allegations contained in paragraph VII of said libel, except that these answering parties admit the jurisdiction in Admiralty and Maritime matters of this Honorable Court.

For Answer to Libelant's Further, Separate, Distinct and Second Cause of Action, these Answering Parties Admit, Deny and Allege: [14]

I.

Answering the paragraphs of said libel incorporated in said alleged second cause of action by paragraphs VIII and X of said libel these answering parties repeat, reiterate and incorporate herein by reference, the same as though specifically set forth, paragraphs I, II, III, IV, V and VI of this their answer to said libel.

II.

Admit the allegations set forth and contained in paragraph IX of said libel, and in that connection allege that Case Construction Company, its agents, employees and servants, and the Tug "Rocona," her master and crew, in every respect did use due and proper care and caution both in the towing and the mooring of said Barge No. 4414, and they and each of them did use, exercise and perform due and proper seamanship in same.

III.

Deny generally and specifically, each and every, the allegations contained and set forth in paragraph XI of said libel.

As and for a First, Separate and Distinct Defense to Said Libel, These Answering Parties Allege:

I.

Libelant's first alleged cause of action set forth in paragraphs I to VII, both inclusive, of said libel, do not nor do any of them, nor do any of the allegations therein contained state facts sufficient to constitute a cause of action against these answering parties, or any of them.

As and for a Second, Separate and Distinct Defense to Said Libel, These Answering Parties Allege:

I.

The facts and circumstances of the incident and occurrence referred to in said libel and in both of the alleged causes of action [15] therein set forth, together with the damage, loss or injury, if any, therein complained of, were and each of them was proximately and directly caused and contributed to by the negligence, fault and unlawful conduct of the libelant through its agents, servants and employees, with particular reference and respect to the improper manner, method and condition of loading said Barge No. 4414, and in providing, furnishing and maintaining an improper, unsafe and dangerous mooring facility, all as more specifically alleged and specified in and by the affirmative allegations hereinabove in this answer set forth, and all of which affirmative allegations are herein and hereby repeated, reiterated, realleged and incorporated herein the same as though specifically set forth herein.

Wherefore, these answering parties pray that libelant take nothing by reason of this cause, that they and each of them go hence with judgment and decree for their

necessary costs, for restitution of the vessel Tug "Rocona," and for such other and further relief as to this Honorable Court may seem meet and proper.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondent and Claimant.

[Verified.]

[Endorsed]: Filed Jun. 20, 1947. Edmund L. Smith,
Clerk. [16]

[Title of District Court and Cause]

PRETRIAL STIPULATION

The parties hereto, by their respective proctors, in order to shorten and simplify the trial of the above matter and to supply deficiencies in proof by any party upon factual issues concerning which evidence is not produced at the trial, do hereby make and enter into the following stipulation:

It Is Stipulated and Agreed that except as the Court may find to the contrary from evidence adduced at the trial, the following facts are true:

FACTS

1. Libellant, a corporation, was engaged in the business of constructing the Terminal Island Mole in Los Angeles Harbor; in furtherance of said operation, its Barge #4414 [17] was being used for transportation of rock from a quarry at Catalina Island to said job. Barge #4414 is an unpowered barge, 119.7 feet in length, 39.5 feet in beam, owned by libellant.

2. Respondent, Johnson Western Company, a corporation, is the successor to the rights and liabilities of the Case Construction Company, a partnership; the respondent, Tug Rocona, was at all times material to this case, a tug 65.8 feet in length, 18.2 feet in beam, powered by a 275 horsepower diesel engine, engaged in the commercial tow boat business, owned by the Case-Connolly Company, a corporation; at said times, said Tug Rocona was operated and managed by the Case Construction Company. and manned by agents, servants and employees of said Case Construction Company who were acting within the scope of their employment as such agents, servants and employees. Due and proper claim to the Tug Rocona was filed in this action by and on behalf of the Case-Connolly Company, a corporation, and said corporation is the claimant herein.

3. On March 31, 1945, said Tug Rocona was operating under a contract of hire whereby for a consideration, said tug fully maintained, manned and equipped by Case Construction Company was to tow libelant's barges from Catalina Island to Los Angeles Harbor.

4. On March 31, 1945, at approximately 1:30 P. M. pursuant to said contract, the Tug Rocona commenced to tow Barge #4414 and another barge from Catalina Island to Los Angeles Harbor. Said barge had been loaded by employees of libelant with 879 tons of rock. Respondents allege [18] and libelant denies, that said barge was negligently loaded in that it had two to three feet of free-board at the bow and six inches to eight inches of free-board at the stern. No employee of libelant was on either said barges or on said tug during said towing. The channel crossing was without incident.

5. At approximately 11:30 P. M. on said date said tug and said barges arrived off the harbor entrance, the

sea towing line was shortened, the other barge was turned over to the tug Dispatch #2 and the Rocona thereupon towed Barge #4414 to a certain mooring float, provided by libelant for mooring said rock barges in the outer harbor until their cargoes could be unloaded. The exact time of said mooring, as well as what occurred when the crew of the Tug Rocona moored said barge is in dispute. Libelant alleges and respondents deny that said mooring was negligently performed by said crew.

6. Respondents allege, and libelant denies, that said mooring float was negligently maintained by libelant. Said float is of wood, approximately ten feet square, about four feet in thickness. At the center of the underside of said float is a large "U" bolt of 1½ inch diameter iron which projects eight or ten inches from the surface and to which is attached an anchor chain leading to a 15 or 20 ton granite boulder which rests on the bottom. On the topside of the float, to a similar "U" bolt is attached a mooring pendant in the free end of which an eye is woven.

7. At the time of mooring said barge, the wind was [19] negligible. Ordinarily currents and surges of the outer harbor were present. The state of the tide at times material to this action was as recorded by the United States Coast and Geodetic Survey, the official records of which will be offered in evidence at the trial.

8. Subsequent to the mooring of Barge #4414, she was discovered to be listing and dumping part of her load of rock. To prevent the barge from sinking with her load of rock, 808.86 tons of rock was intentionally dumped overboard in the outerharbor by libelant. On the following day said barge was capsized and it was found that a hole approximately the size and shape of

one of the "U" bolts on the float had been punched through her bottom.

ISSUES

Libelant states the issues of fact as follows:

1. In the first cause of action (based upon an alleged liability of respondents as bailees):
 - a) Was Barge #4414 delivered to respondents in good condition and
 - b) Redelivered in the like good condition?
2. In the second cause of action (based upon alleged negligence):
 - a) Was the barge properly loaded by libelant at Catalina Island, if not is there any proximate causation between said manner of loading and the subsequent damage to said barge?
 - b) Was the said barge properly moored by respondents and if not was the damage proximately caused thereby?
 - c) Was the mooring float properly maintained by libelant and if not was the damage to the barge proximately caused thereby? [20]

The issues of law involved are:

1. In the first cause of action:
 - a) Is the legal relationship of the parties that of bailor-bailee?
 - b) Do respondents have the burden of showing that the damage to the barge was caused under circumstances in which respondents were without fault?
2. In the second cause of action:
 - a) Were respondents at fault?
 - b) Was libelant at fault?

3. The Court can find that this damage was due to
- a) Sole fault of respondents
 - b) Mutual fault
 - c) No fault of respondents. (This finding would include a finding of unavoidable accident.)

Respondent and claimant state the issues as follows:

The basic and principal issue of fact for decision by the Court is whether or not respondents are chargeable with actionable negligence under all of the facts and circumstances. Further, whether, under all of the facts and circumstances of the case libelant is chargeable with negligence proximately causing or contributing to the damages sustained by Barge #4414.

It Is Further Stipulated and Agreed that in the event of a finding of sole fault of respondents or a finding of mutual fault, that this Court may enter an Interlocutory Decree and Order of Reference to a special Master to ascertain damages sustained by libelant. In the event of a finding that respondents were without fault or that the damage was due to unavoidable accident, this Court's decree may be for dismissal of the libel. [21]

Dated at Los Angeles, California, this 12 day of December, 1947.

McCUTCHEN, THOMAS, MATTHEW,

GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Libelant

HILL, MORGAN & FARRER

WILLIAM S. SCULLY

Proctors for Respondents and Claimant

[Endorsed]: Filed Dec. 12, 1947. Edmund L. Smith,
Clerk. [22]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial on December 16, 1947, before the Honorable Campbell E. Beaumont, United States District Judge. Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene by George E. Toner, Esq. appeared for libelant and Messrs. Hill, Morgan and Farrer by William S. Scully, Esq. appeared for respondents and claimants. The case was submitted on the pleadings, oral testimony and exhibits offered in evidence in connection therewith and on oral argument of counsel. The Court having been fully advised in the premises and having delivered its [23] oral opinion, now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The Court finds that libelant, at the times mentioned in the libel, owned an unpowered barge designated as Barge 4414, 119.7 feet in length, 39.5 feet in beam, used for transporting rock from Catalina Island to the Terminal Island mole in Los Angeles Harbor, in furtherance of libelant's business in the construction of said mole.

II.

The Court finds that respondent Johnson Western Company, a corporation, is the successor to the rights and liabilities of the Case Construction Company, a partnership; that at the times mentioned in said libel, the Case Construction Company, by its agents, servants and employees manned and operated respondent tugboat Ro-

cona; that claimant Case Connolly Company, a corporation, owned said respondent tugboat Rocona; that said respondent tugboat Rocona was a vessel 65.8 feet in length, 18.2 feet in beam, powered by a 275 horsepower diesel engine, engaged in the commercial towing business.

III.

The Court finds that at the times mentioned in the libel respondent tug Rocona was operating under a contract of hire whereby for a consideration, said tug fully manned, maintained and equipped by Case Construction Company was to tow and did tow libelant's barges, including Barge 4414 from Catalina Island to Los Angeles Harbor.

IV.

The Court finds that on April 1, 1945 said Barge 4414 was holed and damaged while it was being moored by respondent tug Rocona [24] at a certain mooring float in Los Angeles Harbor.

V.

The Court finds that the facts pertinent to said damage are as follows:

On March 31, 1945, at approximately 1:30 P. M., pursuant to said contract, respondent tug Rocona took Barge 4414 in tow at Catalina Island. At said time said barge was in seaworthy condition, loaded with 879 tons of rock, and that as loaded, said barge had a draft of approximately nine feet; that the gross tonnage of said barge and cargo was approximately 1200 tons.

Said barge was towed tandem with another barge across the Catalina Channel without incident. Said tug and tow arrived at the Los Angeles breakwater entrance at approximately 11:30 p. m., and entered the harbor; respondent tug Rocona thereafter delivered the other barge to the tug Dispatch for mooring, placed a crew member aboard the Barge 4414 for the purpose of mooring said barge to a mooring float provided by libelant. Said mooring float consisted of a solid wooden block approximately ten feet square by four feet thick. To the top surface of said float was affixed a large "U" bolt about ten inches high, made of $1\frac{1}{2}$ " iron to which was attached a mooring pendant or steel cable approximately forty feet in length into the loose end of which an eye was spliced; a chain, approximately seventy-five feet in length led from a similar "U" bolt in the under surface of the float to an anchor. Respondent tug Rocona towed said barge at a slow speed toward said float until it was within a distance of approximately 100 feet of said float when the tug's engine was shut off. The barge's momentum carried it slowly forward into and over said mooring float. Just before the forward rake of the barge passed over the float, the crew member of respondent tug Rocona who had been transferred to the barge, picked up the mooring pendant with a boathook, placed [25] it over the forward starboard Samson post of the barge, released the towing bridle and returned to the tug which had meanwhile backed down to the barge. The tug took no steps to stop the barge. The barge continued its for-

ward motion, overriding the mooring float until the mooring pendant and anchor chain became taut. As the barge was stopped, the "U" bolt of the mooring float was driven through the bottom four-inch planking of the barge, causing a hole approximately the size and shape of the "U" bolt, at a point about forty feet from the starboard forward Samson post, measured along the rake and bottom of the barge. The barge began to take water and within an hour was discovered to be in a sinking condition. A large portion of the cargo of rock was lost as the result of the partial capsizing of said barge.

VI.

The Court finds that in view of these facts the crew of respondent tug Rocona was negligent in the following respects:

- a) Respondent tug Rocona was improperly and negligently maneuvered so as to cause Barge 4414 to override the said mooring float.
- b) Respondent tug Rocona approached said float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there prevailing.
- c) Respondent tug Rocona negligently failed to stop the forward motion of Barge 4414 upon reaching said mooring float.
- d) Respondent tug Rocona negligently and carelessly moored Barge 4414 in that during said mooring said barge was allowed to override said mooring float.
- e) Respondent tug Rocona failed to take reasonable steps to avoid causing said Barge 4414 to override the said [26] mooring float.

VII.

The Court finds that the damage to Barge 4414 was caused solely and proximately by negligence of said tug Rocona.

VIII.

The Court finds that the testimony of the witnesses of respondents and claimant that they moored said barge properly is not convincing and cannot be accepted.

IX.

The Court finds that respondent tug Rocona was solely at fault in the particulars set forth herein, and that the resulting damage to Barge 4414 and loss of its cargo was caused solely by the said negligence of said respondent tug Rocona.

X.

The Court finds that it is not true that libelant was negligent in respect to the manner, method or condition of loading of said Barge 4414 or in providing, furnishing or maintaining said mooring float or in any other respect alleged in the answer to the libel or in any other respect or at all.

XI.

The Court finds that all allegations of the answer which are inconsistent with the foregoing findings of fact are untrue.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

I.

That neither Barge 4414 nor said libelant or either of them committed any fault or negligence in the premises.

II.

That respondent tug Rocona was negligent and in sole fault [27] in the premises.

III.

That the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent tug Rocona.

IV.

That respondent Johnson Western Company is liable to libelant for the fault and negligence of the respondent tug Rocona.

V.

That libelant Guy F. Atkinson Company is entitled to recover from respondent tug Rocona and respondent Johnson Western Company all losses and damage sustained by said libelant in the premises as aforesaid together with interest and costs.

Dated Feb. 10, 1948.

C. E. BEAUMONT

United States District Judge

Approved as to form. Hill, Morgan & Farrer, by William S. Scully, Proctors for Respondents and Claimant.

[Endorsed]: Filed Feb. 10, 1948. Edmund L. Smith, Clerk. [28]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 6936-B

GUY F. ATKINSON COMPANY, a corporation,
Libelant,

vs.

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation,

Respondents,

and

CASE CONNOLLY COMPANY, a corporation,
Claimant.

INTERLOCUTORY DECREE AND ORDER OF
REFERENCE

By reason of the law and the findings of fact on file
herein,

It Is Hereby Ordered, Adjudged and Decreed that the
damage to Barge 4414 which occurred in Los Angeles
Harbor on April 1, 1945, referred to in the pleadings and
the findings of fact and conclusions of law herein, and
the losses and damages resulting therefrom were caused
through the sole fault of respondent tug Rocona and of
those in charge of her navigation and,

It Is Further Ordered, Adjudged and Decreed that
libelant, Guy F. Atkinson Company, do have and recover
from the respondent [29] tug Rocona and from respondent
Johnson Western Company, the full amount of the
losses and damages sustained by said libelant, together
with interest and costs; and

It Is Further Ordered, Adjudged and Decreed that this cause be and it is hereby referred to Howard V. Calverley, Esq., United States Commissioner as special master, to ascertain the damages sustained by said libelant and to make findings and report his conclusions thereon to this court with all convenient speed.

Dated this 10th day of February, 1948.

C. E. BEAUMONT

United States District Judge

Approved as to form. Hill, Morgan & Farrer, by William S. Scully, Proctors for Respondents and Claimant.

Judgment entered Feb. 10, 1948. Docketed Feb. 10, 1948. Book 48, page 453. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Feb. 10, 1948. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

NOTICE OF APPEAL

To Guy F. Atkinson Company, a corporation, Libelant, and to Messrs. McCutchen, Thomas, Matthew, Griffiths and Greene, Harold A. Black, and George E. Toner, Esquires, Its Attorneys:

You and Each of You Will Please Take Notice: The Tug Rocona, etc., and Johnson Western Company, a corporation, respondents, and Case Connolly Company, a corporation, claimant, in the above entitled cause hereby appeal to the next United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, Cali-

fornia, from the Interlocutory Decree and Order of Reference of this Court entered herein on the 10th day of February, 1948, and [31] from each and every part of said Decree.

Dated at Los Angeles, California, February 18, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed & mld. copy to Geo. E. Toner, Atty. for Libelant, Feb. 20, 1948. Edmund L. Smith, Clerk. [32]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, Southern District of California, Central Division:

Petitioners, the Tug Rocona, Johnson Western Company, a corporation, respondents, and Case Connolly Company, a corporation, claimant, pray that they may be permitted to take an appeal from the Interlocutory Decree and Order of Reference entered in this case on February 10, 1948, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

Dated at Los Angeles, California, February 16, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [33]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of the Tig Rocona and Johnson Western Company, Respondents, and Case Connolly Company, a corporation, Claimant, herein, for an appeal from the Interlocutory Decree and Order of Reference entered in this case on February 10, 1948, and from the whole thereof, and on consideration of the Assignment of Errors filed herewith, and upon consideration of the Stipulation re: Stay of Proceedings and Security for Costs on Appeal, and Good Cause Appearing Therefor:

It Is Ordered, that the appeal herein be allowed as prayed for, and

It Is Further Ordered, that all further proceedings in this [34] Court, including but not limited to the reference to Howard V. Calverley, Esquire, United States Commissioner and Special Master, ordered by the Interlocutory Decree and Order for such reference, be and they are hereby stayed pending final disposition of the said appeal herein allowed, and

It Is Further Ordered, that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith sent to the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered, that no bond for costs, or other security on appeal, is required of respondents and claimant.

Dated February 17, 1948.

C. E. BEAUMONT

United States District Judge

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [35]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

The Tug Rocona, etc., Johnson Western Company, a corporation, and Case Connolly Company, a corporation, respondents and claimant herein, assign the following errors in these proceedings:

1. The District Court erred in rendering a decree for libellant in any particular, or at all.

2. The District Court erred in holding that respondent, the Tug Rocona, was improperly and negligently navigated, maneuvered or operated, so as to cause Barge 4414 to override the mooring float.

3. The District Court erred in holding that respondent, Tug Rocona, approached the float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there [36] prevailing.

4. The District Court erred in finding that respondent, Tug Rocona, negligently failed to stop the forward motion of Barge 4414 upon reaching the mooring float.

5. The District Court erred in finding that the respondent, Tug Rocona, negligently and carelessly moored Barge 4414, in that during said mooring said Barge was allowed to override said mooring float.

6. The District Court erred in finding that the respondent, Tug Rocona, failed to take reasonable steps to avoid causing Barge 4414 to override the said mooring float.

7. The District Court erred in finding that the damage to Barge 4414 was caused solely, proximately, or at all, by negligence of the Tug Rocona, her master, agents, or employees.

8. The District Court erred in finding that the loss of the cargo of Barge 4414 and the damage to Barge 4414 were caused solely, or at all, by the negligence of respondent, Tug Rocona.

9. The District Court erred in failing to find that libelant was negligent in respect to the manner, method and condition of loading Barge 4414, and in failing to find that libelant was negligent in providing, furnishing, and maintaining the mooring float, all as alleged in the Answer to Libel filed by respondents and claimant.

10. The District Court erred in holding that Barge 4414 was not moored safely and properly by respondents.

11. The District Court erred in holding that Barge 4414 sustained damage to her hull during the time said Barge was in custody of respondents, and prior to the completion of delivery of said Barge to the mooring float furnished and maintained by libelant.

12. The District Court erred in holding that Barge 4414 sustained damage prior to the time respondent, Tug Rocona, departed from the scene of the mooring. [37]

13. The District Court erred in failing to find that the anchor chain attached to the mooring float was too short to constitute a safe and proper mooring facility.

14. The District Court erred in presuming and inferring that respondents were negligent and through such negligence caused damage to Barge 4414, upon the basis of the speculation, conjecture and inference, which was not proven, that the said Barge 4414 sustained such damage prior to the time the respondent, Tug Rocona, departed from the scene of the mooring.

15. The District Court erred in placing the burden of proof upon respondents and claimant to show that re-

spondents were not negligent in towing and mooring Barge 4414.

16. The District Court erred in failing and refusing to accept the testimony of witnesses for respondents and claimant.

17. The District Court erred in applying the presumption of prima facie negligence against respondents and claimant upon proof of circumstances by libelant.

18. The District Court erred in holding respondents to have been negligent in the mooring of Barge 4414 and in holding that said respondents caused damage to said Barge, by basing said holdings and findings upon speculation and conjecture.

19. The District Court erred in holding that the momentum of Barge 4414 at time of mooring carried it slowly forward into and over the mooring float.

20. The District Court erred in finding that Barge 4414 began to take water and within an hour after mooring was discovered to be in a sinking condition.

21. The District Court erred in finding that all the allegations of the Answer filed by respondents and claimant which are inconsistent with the findings of fact made and entered by the District Court, are untrue.

22. The District Court erred in holding that neither [38] Barge 4414 nor libelant, or either of them, committed any fault or negligence in respect to the matters and things alleged in the Libel.

23. The District Court erred in holding that respondent, Tug Rocona, was negligent and in sole fault in the premises.

24. The District Court erred in holding that the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent, Tug Rocona.

25. The District Court erred in holding that Guy F. Atkinson Company is entitled to recover from respondent, Tug Rocona, and respondent, Johnson Western Company, all losses and damages sustained by libelant in the premises, together with interests and costs.

26. The District Court erred in admitting the opinion evidence of libelant's witnesses as to the cause of the damage sustained by Barge 4414, which opinion evidence was specifically objected to and admitted over the objection of respondents and claimant.

27. The District Court erred when, in effect, it implicitly applied the doctrine of *res ipsa loquitur* in deciding this cause.

Dated, February 16, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

STIPULATION RE: STAY OF PROCEEDINGS
AND SECURITY FOR COSTS ON APPEAL

Whereas, respondents and claimant in the foregoing action have indicated their intention to appeal from the Interlocutory Decree and Order of Reference entered herein, and

Whereas, on or about June 20, 1947 respondents and claimant filed their Stipulation for Costs (Local Admiralty Rule No. 105) in the penal sum of Two Hundred

Fifty Dollars (\$250.00), in and by which all costs in this Court, or in any appellate court, were secured, and

Whereas, on or about May 28, 1947 claimant filed Special Bond to Marshal for Release of Libel in the penal sum of Five Thousand Dollars (\$5,000.00) in and by which the payment of any money awarded by the final decree rendered in this Court or the [40] appellate court was secured.

Now, Therefore, It Is Hereby Stipulated, by and between all of the parties to the foregoing action, through their respective proctors, as follows:

1. No additional bond or other security for costs on appeal in respect to the proposed appeal from the said Interlocutory Decree and Order of Reference need be posted or filed by respondents or claimant.

2. The Court, if it deems such action to be just, may in the course of allowing said proposed appeal, order that all further proceedings in this Court, including but not limited to the reference to a Special Master in respect to the ascertainment of damages sustained by libelant, be stayed pending the final disposition of such appeal.

Dated at Los Angeles February 16, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE

HAROLD A. BLACK, and
GEORGE E. TONER

By George E. Toner
Proctors for Libelant

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Respondents and Claimant

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith,
Clerk. [41]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 43, inclusive, contain the original Citation on Appeal and full, true and correct copies of Libel in Rem and in Personam; Answer to Libel; Pretrial Stipulation; Findings of Fact and Conclusions of Law; Interlocutory Decree and Order of Reference; Notice of Appeal; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Stipulation re Stay of Proceedings and Security for Costs on Appeal and Stipulation and Order re Documents to be included in Apostles on Appeal which, together with the original Reporter's Transcript and original Libellant's Exhibits 1 to 5, inclusive and original Respondents' Exhibits A and B, transmitted herewith, constitute the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$5.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, December 16, 1947

Appearances:

For Libelant: McCutchen, Thomas, Matthew, Griffiths & Greene, by George E. Toner, Esq., 704 Roosevelt Building, Los Angeles 14, California.

For the Respondents and Claimants: Hill, Morgan & Farrer, by William S. Scully, Esq., 411 West Fifth Street, Los Angeles 13, California [1*]

Los Angeles, California, Tuesday, December 16, 1947.

10:00 A. M.

The Clerk: 6936-B, Atkinson Company v. The Rocona.

Mr. Toner: Ready for libelant.

Mr. Scully: Ready for respondent and claimant, your Honor.

The Court: You may proceed.

Mr. Toner: If the court please, this is a libel arising out of damage sustained by a certain barge belonging to the libelant, called the Barge 4414. It was a rock barge, which was being used to transport rock from the quarry at Catalina Island to the mole construction job at Terminal Island.

I have here a 1947 chart of the harbor showing the completed mole. Now, this accident, as it occurred in 1945, of course occurred at a time when the mole had not

*Page number appearing at top of page of original Reporter's Transcript.

yet been completed, they were actually working on the mole, so I will have one of the witnesses alter the chart to indicate how far the mole job had been completed at the time.

Counsel has indicated that he is willing to stipulate to the entry of this chart as an exhibit.

The barge was loaded at Catalina Island by the libellant's employees and turned over to the respondent tug, and it was to be delivered at the job. At the job they have a number of mooring floats, which are square blocks of timbers bound together and moored to the bottom by an anchor chain and [2] anchor, and the barges were taken into the harbor, moored to the mooring floats, and there they awaited their need on the job.

The Court: Let me interrupt you there if I may, Mr. Toner.

Mr. Toner: Certainly.

The Court: Referring to page 3 of the stipulated facts, the last line in paragraph 6: "On the top side of the float, to a similar 'U' bolt is attached a mooring pendant in the free end of which an eye is woven." That does not explain the situation there entirely to me. I would like to have you amplify somewhat on that.

Mr. Toner: The float is roughly built like a block. It is 4 feet thick and 10 feet square. In the top there is an eye or staple, glorified staple, about 8 to 10 inches high, made of an inch and a half diameter iron.

The Court: Is that attached—

Mr. Toner: To the float.

The Court: The top side of the float?

Mr. Toner: Yes. The bottom side of the float has a similar eye, and that goes to the anchor chain.

The Court: I think that is clear enough.

Mr. Toner: To the top eye is this cable, and in the end of the cable they have a loop, a bite, an eye, and that is slipped over the mooring bit of the barge. [3]

The Court: This "U" bolt on the top side is of this heavy iron?

Mr. Toner: Yes.

The Court: And attached to that—is that a cable?

Mr. Toner: That is a metal cable.

The Court: That is used for the purpose of mooring the craft that comes alongside?

Mr. Toner: The barge is moored to the float, and then stays there until it is needed on the job.

The Court: That is all I wanted to find out.

Mr. Toner: Very well. I will call Mr. Jackson, please.

Mr. Scully: If your Honor please, may I say something for a moment? There are just a couple of items that I would like to refer to that Mr. Toner mentioned, may it please your Honor. One, that I have indicated agreement and stipulation that the chart may go in as evidence. That is substantially true, except that inasmuch as according to counsel's statement it is not a true representation of the conditions at the time material to the issues on trial, I should like to have it entered that I am agreeable to the use of the chart by the witnesses for the purpose of illustrating their testimony, not as the chart in itself proving anything as a piece of evidence. Only insofar as it may be used by the witnesses for purposes of illustration.

I believe that is probably what Mr. Toner meant, isn't it, [4] Mr. Toner?

Mr. Toner: Yes, that is correct.

The Court: It is intended to be used for illustrative purposes only?

Mr. Scully: Yes, your Honor. Secondly, Mr. Toner I think rather inadvertently, because his allegation does not support it, and our stipulation does not accord with that view—the engagement of the libeled tug, The Rocona, in respect to the towing, was not to deliver the barge to the job, but to deliver her to the harbor and moor her safely.

The Court: Read that statement, please.

(The statement was read by the reporter.)

The Court: Proceed. Call your witnesses.

Mr. Toner: There is one other point I think I overlooked, and that is that counsel is going to present a tide table and the official record of the state of the tide at the hour involved. We will have no objection to that, because those are official records.

I call Mr. Jackson.

Mr. Scully: I will have to acquire that from the United States Coast and Geodetic Service offices in this building. I haven't had an opportunity to do that yet, but I will do so during the next recess. [5]

F. C. JACKSON,

called as a witness by and on behalf of the libellant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: F. C. Jackson.

Direct Examination

By Mr. Toner:

Q. What is your present address, Mr. Jackson?

A. Big Bear Lake, California.

Q. Your present occupation? A. A realtor.

(Testimony of F. C. Jackson)

Q. You are not now employed by the Guy F. Atkinson Company? A. No, sir.

Q. What has been your previous experience about the harbor?

A. Well, I was from 1918 to 1925 superintendent for the Harbor Department building breakwaters and so forth, had charge of the quarry and the equipment between Catalina and San Pedro, and then I was employed by the Atkinson Company for 10 years as superintendent, built the Anaheim landing breakwaters, and from there went over to the mole for a short while.

Q. On March 31, 1945 you were employed by the Guy F. Atkinson Company? [6] A. Right.

Q. In what capacity were you employed?

A. Superintendent of one shift, of what we call the graveyard shift, from 12:00 to 8:00 in the morning.

Q. What was the nature of your duties in the morning?

A. As a general superintendent, to see that the operation was carried on efficiently.

Q. What connection did you have with the unloading and loading of these rock barges?

A. In charge of it.

Q. At which end of the job did you stay?

A. Well, practically all over, but mostly with the derrick barges.

Q. That was at the Los Angeles end?

A. Yes, that's right. Only there. Not at the Island.

Q. You were not at the Island? A. No, sir.

Q. Mr. Jackson, I show you the United States Geodetic Service chart No. 5147, Los Angeles and Long Beach Harbors, and ask you to look particularly at the area

(Testimony of F. C. Jackson)

about the mole and advise the court as to whether or not that is the true and correct representation of the mole as it exists at the present time.

A. As far as I know it is. It wasn't finished when I left there. [7]

Q. Would you mark on this chart the situation as it existed with reference to the extent of completion of the mole on March 31, 1945?

A. Well, as close as I can remember it.

Q. Just approximately as you remember it.

A. As close as I can remember, this—I would say this was finished about like that (indicating).

The Court: Talk a little louder, please.

A. As far as I remember, that has been quite some time ago and I haven't just kept it in my mind or thought much about it since then, but it was finished approximately, as far as I can remember, up to here (indicating), about that place there. We had begun to get some of this in here (indicating).

Q. By Mr. Toner: Indicating the portion of the mole toward the end of the mole?

A. That's right. The fact of the matter is that we did have some at a low water mark at the end of the mole. But as far as finished—

Q. Will you mark the end of the mole with the letters "End," end.

(Witness does as requested.)

Q. Will you mark the point you have indicated as the end of the construction of the mole in 1945 with the figures "1945." [8]

(Witness does as requested.)

(Testimony of F. C. Jackson)

Q. Where were the mooring floats?

A. Approximately right in here (indicating), if I remember right.

Mr. Toner: Witness marking an "X."

Q. By Mr. Toner: Was there more than one float?

A. Yes, there was one there and one out in here, if I remember correctly (indicating). We had two or three, I am not sure, but I am sure of these two.

Q. You have marked X's at the points where these mooring floats were? A. Yes.

The Court: Mark those X's a little heavier, please, Mr. Jackson. There are so many marks there it is hard to see.

(Witness does as requested.)

Q. By Mr. Toner: Mr. Jackson, will you describe these mooring floats to the court?

A. Well, they are made out of solid timber, about 4 by 10 by 10 with a "U" bolt on each side of them.

Q. When you say 4 by 10 by 10, what are those dimensions? A. 10 foot square and 4 foot thick.

Q. Are they solid or hollow? A. Solid.

Q. You said there was a "U" bolt at the top and bottom? [9] A. That is correct.

Q. What is the function of these "U" bolts?

A. The one on the bottom holds the anchor chain, the chain that runs from the mooring to the anchor. The other one holds the pendant from the mooring that the barge is fastened to.

Q. What does the anchor line consist of?

A. Sometimes it is a chain; sometimes it is a cable.

Q. What was it at that particular time?

A. I believe it was a cable. I am not positive of that.

(Testimony of F. C. Jackson)

Q. How long a cable was it?

A. Well, that I couldn't say.

Q. Approximately. A. I should say 75 feet.

The Court: It was a metal cable?

The Witness: A metal cable, I believe, your Honor.

Mr. Scully: How far did the witness say?

Mr. Toner: 75 feet.

Q. By Mr. Toner: How was it affixed to the bottom?

A. I wouldn't say as to that one. Some of them we had large heavy rock and some we had anchors, and to that one I wouldn't say.

Q. About how long was the mooring pendant?

A. About 50 feet. We make them about 50 feet long, [10] with an eye on each end.

Q. How large was the eye on each end?

A. Those eyes probably would be—probably 3 feet opening, maybe a little larger, from the end of the eye to where it is spliced. In other words, so it will go around a bit that is about 18 inches square.

Q. At the other end of the mooring pendant from the end that went on to the bit there was also another eye?

A. There is an eye there that was shackled to the eye bolt.

Q. Of what material was the mooring pendant made?

A. $\frac{7}{8}$, I believe, $\frac{7}{8}$ cable.

Q. Steel cable? A. Yes.

The Court: Read the last question and answer.

(The record was read by the reporter.)

Q. Will you describe the rock barges, giving the approximate dimensions and physical characteristics?

Mr. Scully: I object to the question, may it please your Honor, unless he is asked to describe the barge

(Testimony of F. C. Jackson)

which is in suit. Other barges have no materiality to this proceeding.

The Court: Yes, I think that is true.

Q. By Mr. Toner: Will you describe Barge No. 4414, Mr. Jackson, giving the approximate dimensions? [11]

A. If I remember correctly, those barges were about 40 by 130; 40-foot beam and about 130 feet long, square on the end with a rake.

The Court: Would that apply to this particular one?

A. Yes, sir.

Q. By Mr. Toner: Was Barge 4414 similar to the other barges that were used on the job?

A. Similar, yes.

Q. Was Barge 4414 described as a flat barge? Is that how you would describe it?

A. Yes, it is a flat barge.

Q. Will you draw a rough diagram here for the court of the cross-section of the Barge 4414?

(Witness does as requested.)

Q. Is this the top of the barge?

A. That is the top of the barge, and this is the way the bottom runs with a rake, what I call the rake.

The Court: I don't believe you are talking aloud enough for Mr. Scully to hear.

Mr. Scully: I am having some difficulty, your Honor.

The Court: Read the last answer.

(The record was read by the reporter.)

The Court: Proceed.

Q. By Mr. Toner: Where on the barge is the rake located? [12]

A. At the bow and the stern, both.

(Testimony of F. C. Jackson)

Q. Will you describe the rake for the record?

A. There is about 18 inches that comes down from the bow, and then the rake; in other words, the bow of it comes back down about like that (indicating), so as to ride the sea. It doesn't come down straight like that (indicating); it has that rake to it.

The Court: That curve on each end is what you call the rake?

The Witness: Yes, sir.

Q. By Mr. Toner: Will you write the word "rake."
(Witness does as requested.)

Q. Very well. Thanks. Mr. Jackson, is the barge roughly square on the ends?

A. Yes, sir, straight up and down.

Q. In order to explain to the court the procedure, will you describe what was done—

The Court: Mr. Toner, Mr. Jackson made some drawing there, but you haven't offered it to the court.

Mr. Toner: I am sorry, your Honor. I should like to have this diagram marked for identification.

The Court: Let it be marked as Libellant's Exhibit 1 for identification.

It won't do the court much good if it is just marked for identification. [13]

Mr. Scully: I have no objection to it going in evidence for what it is worth, your Honor.

The Court: Let it be received. I want to look at it and see what it shows.

(Document passed to the court.)

The Court: This rectangular part here, Mr. Jackson—

The Witness: That is the bit that we put the cable over, your Honor.

(Testimony of F. C. Jackson)

The Court: That is what these little things are?

The Witness: Yes.

The Court: I am talking about the large one.

The Witness: That is the sides of the barge looking straight down.

The Court: That is the top of the barge looking straight down?

The Witness: Yes.

The Court: This would be the side?

The Witness: Yes, looking down.

The Court: May I mark "Side" over here?

Mr. Toner: Yes.

The Court: Mr. Scully, may I mark "Side" there?

Mr. Scully: Yes, your Honor, whatever makes it convenient to the court.

The Court: I have an idea that Mr. Jackson isn't a much better artist than I am, and that wouldn't be any too good, [14] but I think I get the idea. This part that is marked the side with the rake on each end represents the lower part of the barge, the side that goes into the water?

The Witness: That is correct.

The Court: And the top part here would be the top side of the barge?

The Witness: Yes.

The Court: And these little four rectangles in the corner are what?

The Witness: The bits that they moor the barge with, where they put the cable over them from the mooring.

The Court: From the mooring they go—

The Witness: Around it.

The Court: All right.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: When these barges are towed from Catalina Island, are they towed singly or in tandem?

Mr. Scully: Just a minute. I object very much to be interrupting counsel's examination, but—

The Court: Yes, I think that is too general.

Mr. Scully: And it doesn't relate to the facts on trial.

The Court: Not what generally is done, that wouldn't be important, would it, Mr. Toner? What was done in this particular case?

Mr. Toner: I think, if the court please, we are entitled to show that what was done in this particular case was done in [15] accordance with the customary practice.

The Court: Is there any issue that that would apply to?

Mr. Toner: I don't believe so. I don't believe it is a controverted fact.

The Court: So it seems to me the objection would be good.

Q. By Mr. Toner: When Barge 4414 was brought in—

The Court: The stipulated facts show there were two barges brought, and one was released to another tug.

Mr. Toner: Yes.

The Court: And there is no question concerning that one.

Mr. Toner: That is correct.

Q. By Mr. Toner: Where were you when Barge 4414 was brought in, Mr. Jackson?

A. I hadn't gone on duty yet.

Q. Where was Barge 4414 when you went on duty?

A. It was laying at the outside mooring that I marked here.

Q. You marked two moorings, Mr. Jackson. Which one? A. At this mooring here (indicating).

(Testimony of F. C. Jackson)

The Court: Mark that "FCJ-1."

(The witness does as requested.)

Q. By Mr. Toner: When you first saw Barge 4414, what was her condition?

A. Well, it was floating just about trim. [16]

Mr. Scully: I didn't hear the witness' answer.

(The answer was read by the reporter.)

Q. By Mr. Toner: Do you know how long that was after she had come in?

A. That was shortly after, very shortly after it came in, because the first thing I did then was to make the rounds to look at all the barges and see how everything was laying.

Q. By "very shortly" what do you mean in minutes?

A. I would say 12:30.

The Court: Read the last question and answer.

(The record was read.)

Q. By Mr. Toner: How long had Barge 4414 been there when you first saw it?

A. I couldn't say that.

Q. Do you know about when she came in?

A. I wouldn't like to say that because I don't positively know.

The Court: He wasn't there, Mr. Toner, he testified.

The Witness: No, I wasn't there.

The Court: It would be hearsay.

Q. By Mr. Toner: What was the depth of the water at the point she was moored?

A. About 28 feet, I think.

Q. Did you examine Barge 4414 subsequently?

A. No. The next time we made the rounds about there [17] it was listed quite badly and we opened the

(Testimony of F. C. Jackson)

stern hatch and it was getting pretty well filled up with water, so we started to get a tugboat to pull it inside.

Q. Was there anything unusual that happened to the barge?

A. At the time I didn't know there was anything.

Q. What did the fact that she was listing indicate to you?

A. She was leaking.

Q. Was she loaded at this time?

A. Yes.

Q. Did anything happen to the load?

A. Not at that time.

Q. At any other time.

A. Oh, yes, because—

The Court: Go ahead.

A. The next time I made the rounds, why, she had slipped part of her load.

The Court: Now, Mr. Jackson, when you first saw the barge, as I understand your testimony she appeared to be trim.

The Witness: That's right.

The Court: That would indicate in proper position.

The Witness: Yes, sir.

The Court: Then when was it that you saw her that she appeared to be listing? [18]

The Witness: I should judge that would be in the next hour or hour and a half.

The Court: You first saw her about 12:30?

The Witness: About that, yes.

The Court: About an hour or an hour and a half after that she was listing?

The Witness: That's right. And we started after a tugboat then so we could get her inside to unload her. By the time we got back she had slipped her load.

The Court: That is, part of the load on it—

(Testimony of F. C. Jackson)

The Witness: Dumped it off.

The Court: It had listed so much that part of it had gone overboard?

The Witness: That is right.

Q. By Mr. Toner: Did all of the load fall on one side?

The Witness: That I don't know. But there was quite a bit of rock left on the barge, because I wasn't there when it tipped its side over. It righted up and there was quite a bit of rock left on top of the barge.

Q. Did you see the barge later on? A. Yes, sir.

Q. What was her condition then?

A. She was upside down when I saw her the next time.

Q. When was the next time you saw her?

A. Next evening when I went to work. [19]

Q. Did you notice anything unusual about her at that time? A. It just had the hole in it, that is all.

Q. Where was there a hole in it?

A. I should judge about 25 feet back from the rake, from the bow of the barge.

Q. What was the nature of the hole? How large was it?

A. The plank was caved in, oh, I should judge a foot, maybe a little more. The planks were caved in like something had hit it from underneath (demonstrating).

Q. Was there anything peculiar about the hole itself?

A. Yes, more or less it was about the shape of a "U" bolt.

Q. How far in from the side was it?

A. I should say 5 or 6 feet.

Q. What is the thickness of the planks in the bottom of the barge? A. I think they are 4 inches.

(Testimony of F. C. Jackson)

Q. This hole was punched through the bottom?

A. That's right.

Q. Have you ever seen the actual mooring of a barge similar to Barge 4414?

Mr. Scully: Just a moment, may it please your Honor. I object to that question and the latter question which it undoubtedly seeks to follow, inasmuch as habit, custom, course, [20] and usual procedure is not material to the facts here, where we have witnesses to what occurred.

Mr. Toner: If the court please, we are charging respondents with not operating in accordance with the expected and usual and proper means and manner of mooring this float. I think we are entitled to show what is proper from this man as an expert witness. He has had a wealth of experience in this type of work, he has seen these barges moored many times, and I think I am entitled to show what is the proper way of mooring as the norm of conduct.

Mr. Scully: Your Honor, he hasn't testified that he has moored them, or that he has seen many barges moored. He testified to his presence on the job and the work he did. But even so, aside from all of that, I still stand on my original objection that we are investigating here what was done or not done under the circumstances set forth in the libel, and it is those circumstances, those actions, which this court is called upon to decide as to whether or not due care, due and proper seamanship, proper judgment, et cetera, was exercised on the part of the master involved.

The Court: Will you read the question, please, Mr. Goldstein?

(The question was read by the reporter.)

(Testimony of F. C. Jackson)

The Court: That is a preliminary question. It is overruled. [21]

A. Yes.

Q. By Mr. Toner: Will you describe the process of mooring?

The Court: I do not think just seeing one done would be sufficient foundation.

Q. By Mr. Toner: How many times have you seen a barge similar to Barge 4414 moored?

A. Hundreds of times.

Q. Will you describe the process?

A. Surely. When they get inside of the harbor the towline is pulled in, they take a short bite on the towline and then gradually lose momentum, and come up to a mooring very slowly, pick up the pendant and slip it over the bit, and then unhook their bridle and pull out.

Q. By pulling out you mean the tug pulls away?

A. The tugboat pulls away, yes.

Q. And the barge is left at the mooring?

A. That's right.

Q. Is there any danger associated with mooring a barge, and if so, what is it?

The Court: You had better just have him answer one question at a time.

Q. By Mr. Toner: Is there any danger to the barge associated with mooring it? A. Yes. [22]

Mr. Scully: Objected to as calling for a conclusion of the witness.

The Court: It is overruled. You may answer it.

(The answer is read.)

The Court: It may stand.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: What is the danger?

A. If they come in with too much momentum, why, they are liable to either break the pendant, or as I think was done at this time, that the mooring was pulled underneath the barge.

The Court: You were not asked for this time. Let that part go out.

Q. By Mr. Toner: What is the danger?

A. You can break your mooring chains, or you can break your pendant, or anything else.

Q. Can you pull the mooring float under the barge?

A. Yes, you can.

Q. How would you pull the mooring float under the barge?

A. When the barge hits the mooring it slips right over the top.

Q. How far does it go?

The Court: The barge slips over the top of the mooring?

The Witness: That's right, sir. It can only go as far as the pendant will let it go.

Q. By Mr. Toner: Then what happens? [23]

A. It comes up with a jerk.

Q. How does that endanger the barge?

A. Well, it could punch a hole in it.

Q. What is the proper step to take to avoid such a danger? A. Come in as slow as possible.

Mr. Scully: Objection; it calls for a conclusion of the witness, your Honor, and it is invading the province of the trier of the fact here, what is proper and so forth.

The Court: Read the question, please.

(The question was read.)

(Testimony of F. C. Jackson)

The Court: I think it is anticipatory. That may be a proper question to be asked on rebuttal, but at the present time the court believes it is not. The objection is sustained.

Q. By Mr. Toner: Mr. Jackson, you saw Barge 4414 was loaded with 879 tons of rock, did you?

Mr. Scully: Objected to as leading.

A. I know it was loaded with rock, but I don't know how much was on there.

Q. By Mr. Toner: You saw the barge as she was loaded that night?

A. Yes.

Q. Assume the wind to be negligible, and the ordinary currents and surges of the Los Angeles Harbor to be present; state whether in your opinion it is possible for a barge [24] similar in description, dimensions and draft of Barge 4414, loaded as she was loaded that night, to override a mooring float similar in size and dimensions to the one we have been discussing, without some additional motive force being applied to such barge by some agency other than the normal wind and current, will you state whether or not in your opinion a barge such as I have described could override the mooring float?

A. No, sir, I don't think so.

The Court: Do you understand the question?

The Witness: Yes, sir. I don't think so, without it had some other motive power to pull it.

Q. By Mr. Toner: Is it possible for it to go over the float?

A. No, because the wind or current would swing it around.

Q. By swinging it around what do you mean?

A. If it was moored properly to the mooring then the current or wind would swing the barge around.

(Testimony of F. C. Jackson)

Q. So that the barge would head into the wind, you mean? A. That's right.

Q. Where would the mooring float and the anchor and the mooring pendant be?

A. Well, that would be away from the barge, the wind [25] would blow it around where it would drag on the mooring. It wouldn't touch, oh, at any time it wouldn't touch the mooring.

Q. Did you examine the damage to Barge 4414?

A. Yes, sir.

Q. Do you have an opinion as to what is the cause of the damage to Barge 4414?

A. I have my own personal opinion. It was that the barge overrun the mooring, and when the mooring pendant come up, turned the barge up, the "U" bolt punched a hole in it, that is my personal opinion.

Q. Did you make any complaint to the owners of the tug that was towing that Barge 4414 that night?

A. I am not too positive about that. I know I did one night, but that particular night I am not positive on that.

Q. To whom did you talk?

A. To the man that was in charge at that time of night. I don't remember the man's name.

Q. At what company?

A. The company that owned the tugboat.

The Court: You say at that time of night; what do you mean, Mr. Jackson?

The Witness: Between 12:00 and 8:00.

The Court: When you first saw it it was 12:30?

The Witness: That's right. [26]

The Court: That would be 12:30 A. M.?

The Witness: That's right.

(Testimony of F. C. Jackson)

The Court: And you were on duty from 12:00 midnight to 8:00 the next morning?

The Witness: Correct.

The Court: Was it within that period that you made the statement to the owner of the tug?

The Witness: I don't remember that night, at that night, whether I did or not. It has been so long ago, your Honor, and I haven't thought much about it.

The Court: Go ahead and ask him, Mr. Toner.

Q. By Mr. Toner: You do remember, however, Mr. Jackson, that you did make a complaint to someone?

A. Yes, I did.

Q. What did you tell him?

Mr. Scully: Just a moment, Mr. Jackson. Your Honor, it is not established that there was any complaint made in respect to the mooring of Barge 4414, or the actions of the Rocona that night. The witness has clearly stated that he doesn't know exactly when he made a complaint. He made a complaint to a company whose name he cannot recall, that was doing towing. Now, I submit that unless it is clearly first established that any statement or conversation with parties—unless it is first established that that was in connection with the facts on trial, it is wholly immaterial and inadmissible. [27]

The Court: That is entirely true.

Mr. Toner: He did state, however, that he made a complaint to the company.

The Court: Yes, but it wasn't very certain.

Mr. Toner: I was going to ask him what the nature of the complaint was.

The Court: You had better ask him to whom he made the complaint. Mr. Jackson ought to know, if not to

(Testimony of F. C. Jackson)

Q. So that the barge would head into the wind, you mean? A. That's right.

Q. Where would the mooring float and the anchor and the mooring pendant be?

A. Well, that would be away from the barge, the wind [25] would blow it around where it would drag on the mooring. It wouldn't touch, oh, at any time it wouldn't touch the mooring.

Q. Did you examine the damage to Barge 4414?

A. Yes, sir.

Q. Do you have an opinion as to what is the cause of the damage to Barge 4414?

A. I have my own personal opinion. It was that the barge overrun the mooring, and when the mooring pendant come up, turned the barge up, the "U" bolt punched a hole in it, that is my personal opinion.

Q. Did you make any complaint to the owners of the tug that was towing that Barge 4414 that night?

A. I am not too positive about that. I know I did one night, but that particular night I am not positive on that.

Q. To whom did you talk?

A. To the man that was in charge at that time of night. I don't remember the man's name.

Q. At what company?

A. The company that owned the tugboat.

The Court: You say at that time of night; what do you mean, Mr. Jackson?

The Witness: Between 12:00 and 8:00.

The Court: When you first saw it it was 12:30?

The Witness: That's right. [26]

The Court: That would be 12:30 A. M.?

The Witness: That's right.

(Testimony of F. C. Jackson)

The Court: And you were on duty from 12:00 midnight to 8:00 the next morning?

The Witness: Correct.

The Court: Was it within that period that you made the statement to the owner of the tug?

The Witness: I don't remember that night, at that night, whether I did or not. It has been so long ago, your Honor, and I haven't thought much about it.

The Court: Go ahead and ask him, Mr. Toner.

Q. By Mr. Toner: You do remember, however, Mr. Jackson, that you did make a complaint to someone?

A. Yes, I did.

Q. What did you tell him?

Mr. Scully: Just a moment, Mr. Jackson. Your Honor, it is not established that there was any complaint made in respect to the mooring of Barge 4414, or the actions of the Rocona that night. The witness has clearly stated that he doesn't know exactly when he made a complaint. He made a complaint to a company whose name he cannot recall, that was doing towing. Now, I submit that unless it is clearly first established that any statement or conversation with parties—unless it is first established that that was in connection with the facts on trial, it is wholly immaterial and inadmissible. [27]

The Court: That is entirely true.

Mr. Toner: He did state, however, that he made a complaint to the company.

The Court: Yes, but it wasn't very certain.

Mr. Toner: I was going to ask him what the nature of the complaint was.

The Court: You had better ask him to whom he made the complaint. Mr. Jackson ought to know, if not to

(Testimony of F. C. Jackson)

whom he made the complaint, where he made the complaint. And if it wasn't the same night that he discovered the condition of the barge, then whatever night it was should be rather definitely established. In other words, so it would be tied in to this particular accident and not to some other.

Mr. Toner: I was coming to that, if the court please.

Q. By Mr. Toner: Mr. Jackson, you have testified that you made a complaint to the owner of the Tug Rocona.

Mr. Scully: No, he did not so testify. I object to that.

The Court: No, I do not think he did. I am not so sure that he did.

Q. By Mr. Toner: To whom did you make the complaint, Mr. Jackson?

A. To the tugboat company that owns the Rocona.

Q. How did you make the complaint? Personally or by telephone? [28]

A. Telephone.

Q. What time of the night did you make this complaint?

A. That I won't say, because I can't say definitely.

Q. It was, however, between the hours of 12:00 and 8:00 in the morning?

A. That's right.

Mr. Scully: I object to the question as leading.

The Court: It is leading.

Mr. Toner: He has already testified to that. I am just reviewing it.

Q. By Mr. Toner: Was it during the time you were on the job?

A. No other time.

Q. Do you recall the name of the man to whom you made the complaint?

A. No, sir.

Q. Do you know his capacity?

(Testimony of F. C. Jackson)

A. He was in charge of the tugboats on that shift. I don't remember his name.

Q. What was the nature of the complaint?

Mr. Scully: I object, your Honor, as not sufficiently identified with the facts before this court, the issues before this court.

The Court: Sustained.

Q. By Mr. Toner: Do you recall when the complaint was [29] made? A. No, I couldn't.

Q. Was the complaint made with reference to the mooring of Barge 4414, or was it made with reference to some other accident?

Mr. Scully: Just a moment, Mr. Jackson. I object to the question as leading, your Honor. Counsel has gone with this witness up and down trying his best to get him on the track to say something positive, and he is not succeeding, so he is resorting to leading questions, to which I must object, because this witness is a very willing witness, your Honor.

The Court: The objection is overruled.

Mr. Toner: Read the question.

(The question was read.)

The Witness: It wasn't an accident that I complained of the night I remember about. I was complaining about the way they gave us the service, that is what I was complaining about.

The Court: He wasn't complaining about this particular incident.

The Witness: No.

Mr. Toner: I was under the impression that was what the complaint was about.

The Court: It would not be material, then.

(Testimony of F. C. Jackson)

Mr. Toner: No. [30]

Q. By Mr. Toner: Mr. Jackson, you stated that in your opinion the damage to Barge 4414 was caused as she was pulled over the mooring float, is that correct?

A. That is my personal opinion.

Q. Upon what do you base that opinion?

A. The shape of the plank, and so forth, the hole that was in the bottom of the barge.

Mr.. Toner: That is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Jackson, have you ever been to sea?

A. Kindly explain what you mean by "sea."

Q. Have you ever served as a hand or as an officer aboard a vessel at sea? A. No, sir.

Q. Have you ever held any license—

A. No, sir.

Q. —as seaman or officer aboard a vessel?

A. No.

Q. How long had you worked for the Atkinson Company at the time that this occurrence happened in 1945?

A. About nine years.

Q. And how long did you work for them afterwards?

A. About two years.

Q. And you left their employ of your own volition, did [31] you? A. Absolutely.

Q. And you are still friendly with them?

A. Surely.

Q. You wouldn't do anything to hurt them?

A. I wouldn't do anything to hurt anybody.

(Testimony of F. C. Jackson)

Q. Did you ever take a sounding of the depth of the sea at the point of the mooring of Barge 4414 on the 31st of March, 1945? A. No, sir.

Q. You stated that you thought the depth at that point was 28 feet? A. Around 28 feet, yes, sir.

Q. Do you mean at a time of flood tide or low tide?

A. That would be low tide.

Q. Do you know what the tide was on that day?

A. I do not.

Q. Your guess of 28 feet at low tide was a guess, wasn't it, inasmuch as you hadn't taken a sounding?

A. Yes, because we put our mooring in the water about that depth, 28 feet.

Q. So you really have no knowledge what the facts were at that particular mooring, have you?

A. I said about.

Q. But you have no knowledge of it, have you? [32]

A. No, sir.

Q. Did you ever measure the mooring pendant attached to the float in question? A. The pendant?

Q. Pendant, the mooring pendant that is attached to the top side of the float, which you understand is used—

A. I understand that, but we made all those approximately 50 feet long.

Q. Did you ever observe this particular one?

A. No, sir, I never measured any of them.

Q. Did you see this one when it was made?

A. No, sir.

Q. Did you see it when it was installed?

A. No, sir, but I have picked it up out of the ocean a good many times and put it on top of the float.

Q. Did you make any inspection of that float after the occurrence concerning Barge 4414? A. No, sir.

(Testimony of F. C. Jackson)

Q. When you made your rounds for the first time upon coming on duty that night, which was the night of March 31st-April 1st, 1945, you went out in a speedboat, didn't you? A. Yes, sir.

Q. And you were following your duties in respect to watching the barges and observing them as they had come in for the job? [33] A. Yes, sir.

Q. That was your mission on that speedboat trip, wasn't it? A. That's right.

Q. Your duty at that time and place was to see if everything was secure, is that not true?

A. That's right.

Q. And you had other barges moored to Atkinson floats at that time and place, didn't you?

A. Yes, sir.

Q. You observed them? A. Yes, sir.

Q. And everything was secure as to them?

A. Yes.

Q. And you observed this barge? A. Yes, sir.

Q. And everything was secure as to that barge?

A. That's right.

Q. Then an hour and a half later you found that she apparently was in trouble? A. That's right.

Q. Because she was slipping her load and was apparently listing—did I recall your testimony correctly?

A. Yes, sir.

Q. Mr. Jackson, to whom have you talked about this [34] case before this morning?

A. I beg your pardon?

Q. To whom have you spoken about this case before this morning? A. About this case?

Q. Yes. A. The attorney.

(Testimony of F. C. Jackson)

Q. Do you recall that after it was ascertained that the Barge 4414 was in trouble at her mooring on the early morning of April 1, 1945, other craft were called to assist her?

A. We went in to get the boat to pull the barge inside, so we could get it unloaded, thinking we might save it.

Q. I understand. Perhaps I didn't make my question clear. Do you recall that after she was found to be in difficulties, she was slipping her load and was listing, that other craft were called to assist Barge 4414?

A. Yes.

Q. How many craft? A. Just one.

Q. The Fortuna?

A. I believe that is the name of the tugboat.

Q. It was a tugboat, wasn't it?

A. Yes, sir. [35]

Q. Were you on the spot when the Fortuna was assisting at the barge?

A. No, because the barge had slipped its load, we got back there before the Fortuna got there, and the barge had slipped her load already.

Q. Did you see the Fortuna make fast to the barge?

A. That I can't remember. I don't remember. After it slipped its load I know we hooked onto it and pulled it inside.

Q. You know that the Fortuna did at some time make fast to the barge? A. That is right.

Q. And did pull her in? A. That is right.

Q. You also know, do you not, that the Fortuna assisted in getting her loose from whatever obstacles she was afoul of? A. Well, naturally.

(Testimony of F. C. Jackson)

Q. The surge of the sea, the outer harbor surge, at that time and place, as it is in every other instance, is something entirely different from the wind, isn't it?

A. There is some surge right in there, but not a whole lot.

Q. Just a moment. I didn't ask you that. Please follow my question.

The Court: Read the question.

(The question was read.) [36]

The Witness: Well, yes. Yes, I will say yes.

Q. By Mr. Scully: And the wind doesn't make the surge of the sea, does it? A. No, I can't say that.

Q. Do you know? A. I say that it does not.

Q. So that it is possible, is it not, Mr. Jackson, to have a surge of the sea rolling the sea in one direction, with the wind in another quarter?

Mr. Toner: If the court please, I think that this is all rather general. I think that the question should be directed to what the situation was at the time and place, and I therefore object to the line of questioning.

Mr. Scully: May I be heard on that a moment?

The Court: I think it is proper cross-examination. It is overruled.

Q. By Mr. Scully: Do you understand my question, Mr. Jackson? It is rather complicated.

A. I think your idea and mine are rather different. You are trying to get me to say that the wind was rolling up a sea, which isn't a real surge.

Q. No. Mr. Jackson, please don't speculate as to what my purpose is in examining you under cross-examination. First of all, I want to assure you that I am not trying to trap you. Let's understand that. I am trying to

(Testimony of F. C. Jackson)

be fair and honest with [37] you. I am merely trying to test not only your recollection, but I am trying to test the subject-matter—

The Court: You do not need to explain any further to the witness, Mr. Scully.

Mr. Jackson, you just answer the question if you can remember what it was. Do you remember what it was? Could the surge that Mr. Scully has been speaking of be in one direction and the wind in another direction?

The Witness: It could be.

Mr. Scully: Your Honor, may I see Plaintiff's Exhibit 1?

(A paper was handed to counsel.)

Q. By Mr. Scully: Mr. Jackson, perhaps I don't fully understand the purport of this sketch. Am I correct in understanding that you drew a cross-section here of the barge? A. This is supposed to be the top.

The Court: Just as if—

The Witness: You were looking down on it, yes.

Q. By Mr. Scully: This is the side, and this is the bow over here, and this is the stern; is that about correct?

A. You can use it any way you want to?

Q. It is really a double-ender, isn't it?

A. That is correct.

Q. So that seeing her move through the water she would move about like that (indicating), is that correct?

A. Yes. [38]

Q. I am just trying to get myself oriented on your sketch. Will you take my pencil and designate on the bottom of the barge where you observed approximately the point of damage or the point of impact?

A. About 5, 6 feet in.

(Testimony of F. C. Jackson)

Q. Will you mark that "J-2"?

(Witness does as requested.)

The Court: Five or six feet in from what?

The Witness: From the bottom of the barge. In under.

Q. By Mr. Scully: From the side? A. Yes.

Q. From the starboard side or port side?

A. I believe it was starboard. I am not too positive. I believe it was the starboard side.

The Court: Then the bow would be at this end if this is the starboard?

The Witness: This end here (indicating).

Mr. Scully: Let's mark this "Bow," shall we, to designate it?

The Witness: Sure, we can mark it.

(Witness does as requested.)

The Court: And this is 28 feet across, isn't it?

The Witness: It is more than that. It is about 40 feet.

The Court: You think it was about 5 or 6 feet in under the bottom? [39]

The Witness: That's right. And somewhere around 25 feet back from the bow.

The Court: Do you think you have got about the right distance here?

The Witness: Yes.

The Court: I think not, because it is 130 feet long.

The Witness: Yes.

The Court: Well, in any event we don't have to be too particular.

Mr. Scully: It is not scaled.

(Testimony of F. C. Jackson)

The Court: In any event we might say it would be in about this position underneath (indicating)?

The Witness: That is right, your Honor.

The Court: That would be "J-3."

Q. By Mr. Scully: J-3 indicates a point—correct me if I am wrong in reciting this—the point J-3 was observed to be approximately 25 feet in the direction of the stern from the forward rake? A. That is right.

Q. From the bow? A. About that.

Q. And about 5 or 6 feet inboard from the starboard side of the craft, is that correct?

A. That is about correct, yes.

Q. All right. Now, you saw— [40]

The Court: For purposes of understanding the position we have made this "J-3" on top. As a matter of fact, it showed only on the bottom, is that correct?

The Witness: That's right.

Q. By Mr. Scully: And the direction of the damage was inward as observed on the bottom, was it?

A. In, yes.

Q. You saw the barge—

The Court: That would be inward and upward?

The Witness: Yes. In other words, if this was the bottom, the planks was pushed in, pushed up.

The Court: Go ahead.

Q. By Mr. Scully: You saw the barge the next day after she was capsized, didn't you? A. Yes.

Q. And she had been beached, I believe, for that purpose?

A. She wasn't beached. She was pulled up alongside of the dock.

Q. It was for an inspection purpose that she was capsized? A. Yes, to be repaired.

(Testimony of F. C. Jackson)

Q. As you looked at the hull that day did you notice any markings on the hull as apart and distinct from the hole itself? [41]

A. If I remember right there was kind of a scraping across here.

Q. Do you mind if I draw a rectangle and call it the bottom of the barge? I am no naval architect. We will call it the bottom of the barge. We will forget about the rake. The rake would be going this way (indicating) if we had it bottom side up. Let's put this mark and call it "J-4" as the arbitrary point of the hole through the bottom. I will mark "Bow" and I will mark "Stern" on this rectangle. Will you now point out the location or approximate location of the markings that you observed on the hull? A. (Witness does as requested.)

Mr. Scully: The witness has drawn a light line.

Q. By Mr. Scully: Do you mind if I trace that a little heavier? A. No.

Mr. Scully: Indicating parallel to the—this would be the starboard side?

Mr. Toner: That would be port side if she was upside down. Unless we are looking at it from below.

Mr. Scully: In any event, it was in the direction of the bow, was it, towards the point of damage?

The Witness: After all, there was a hole there, that is all.

Q. By Mr. Scully: Did you, Mr. Jackson, notice some [42] markings on the hull of the vessel in the direction of the starboard side?

A. It seems to me, if I remember right, there was a kind of a scraping for a short distance, four or five feet, up to just about where the hole is.

(Testimony of F. C. Jackson)

Q. You didn't notice any scrapings further towards the bow?

A. I don't remember. That has been so long ago.

Q. I realize we can't expect you to remember exactly.

The Court: But the scraping indication that you did notice was from the hole towards the bow?

The Witness: That's right, yes, sir.

The Court: That is sufficient.

Q. By Mr. Scully: The mooring that you have marked with X's on the chart, was there more than one?

A. There was two moorings here. This is one here; the second one down was the one that 14 was moored to.

The Court: That is "J-1"?

The Witness: Yes.

Q. By Mr. Scully: About how far was "J-1" off the shore or the point where you were working and the Atkinson job was being constructed?

A. I would say about 300 feet.

Q. And this was dark, of course? A. Sure. [43]

Q. Was there a moon?

A. I don't remember whether there was moonlight or it was dark. It was about 300 feet off of there, that is all I can say.

Q. The other mooring marked "X," which does not bear any "J" designation, was occupied at this time by some other craft? A. That I can't answer.

Q. You don't know? A. I don't remember.

The Court: Is there much more cross-examination?

Mr. Scully: I am about concluded, your Honor.

The Court: Very well. Go ahead.

(Testimony of F. C. Jackson)

Q. By Mr. Scully: Have you ever assisted in mooring any of these vessels, any of these barges?

A. Not these particular barges. Only by pulling the cable up and having it there when the boys come in.

Q. Your job has been on the land side in this type of construction job that you were doing there that day, isn't it true?

A. For seven years and a half I had charge, as I told you in the start, I told this attorney, of the barges and the tugboats, derrick barges, that built San Pedro Harbor.

Q. You would go out and get these barges when you needed them at the job after they had been moored by the incoming [44] tugs, is that not true?

A. Not necessarily. I said I had charge of them. I didn't do any of it personally. I had my men do it.

Q. You were in charge of crews?

A. That is right.

Q. You would do that, is that not true?

A. Yes, I was general superintendent.

Q. I understand you didn't actually do the job, but you superintended crews going out and getting these barges from the mooring and taking them in after they had been dropped by the incoming tug? A. That is correct.

Mr. Scully: Thank you very much.

The Court: As I understand it, then, Mr. Jackson, this work at the San Pedro Harbor for the seven-and-a-half-year period that you mentioned, you not only had charge of the land part of the work, but you directed the tugs—

(Testimony of F. C. Jackson)

The Witness: Marine part of it.

The Court: —what to do?

The Witness: Yes, sir.

Mr. Toner: I have just a question or two.

Redirect Examination.

By Mr. Toner:

Q. Mr. Jackson, you testified that when you went out to look at Barge 4414 after she had been moored everything was [45] secure. Did you mean everything was apparently secure? A. That's right.

Q. Actually do you know whether everything was secure on that barge or not?

A. Only apparently. Everything looked all right.

Q. But from what happened later would you say it was secure? A. No.

Q. Was there any wind that night to speak of, if you remember?

A. If I remember correctly there wasn't much of a wind.

Q. Is there any substantial surge or current at the point in question?

A. Well, that is around in behind of the current. The current came in through the end of the breakwater around into the harbor. But in where it lays there is always more or less a surge. I mean an under-the-surface surge. I don't mean a top surge.

The Court: Mr. Toner has referred to a current and then to the surge; do you have in mind that they are one and the same, or that they are different?

The Witness: They are different.

(Testimony of F. C. Jackson)

Q. By Mr. Toner: Is there any surge there?

A. There is a slight surge every place. [46]

Q. And is there any current there?

A. Not much of a current there, no, sir.

Mr. Toner: That is all.

Mr. Scully: No further questions.

The Court: You are excused, Mr. Jackson.

The court will take a recess of a few minutes at this time.

(A recess was taken.)

Mr. Toner: Call Mr. Bach.

SOREN K. BACH,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Soren K. Bach.

Direct Examination

By Mr. Toner:

Q. What is your address, Mr. Bach?

A. 1035 Cerritos Avenue, Long Beach.

Q. What is your present occupation?

A. I am a contractor.

Q. Carpenter contractor?

A. Carpenter contractor, contracting houses.

Q. By whom were you employed on March 31, 1945 and shortly thereafter?

A. Guy F. Atkinson Company. [47]

Q. What was your occupation at that time?

A. Yard superintendent.

(Testimony of Soren K. Bach)

Q. You will have to talk a little louder, Mr. Bach, so that counsel can hear you.

Are you now employed by the Guy F. Atkinson Company? A. No; I am self-employed.

Q. You are self-employed? A. Right.

Q. Did you have charge of the construction of certain mooring floats for the Guy F. Atkinson Company?

A. I did.

Q. Will you describe these mooring floats, their size, description, manner of construction?

A. They were assembled of 12 by 12's, 10-foot-long pieces, until we got a block that was either three layers high or four layers high, all according to the size of the mooring we wanted; bolted together with one-inch bolts. For the purpose of mooring we had a one-inch steel plate approximately I should say 20 by 20 inches, with a two-inch ring that had probably a width of 16 inches, and standing up about 12 inches.

The Court: Read the question and answer.

(The question and answer were read by the reporter.)

The Court: Did this ring that you speak of stand upright in the center of this steel plate? [48]

The Witness: Yes, your Honor.

The Court: How was that affixed to the mooring float?

The Witness: Your bolt is clear through. The same amount of ring on the bottom as it had on the top.

The Court: What was the diameter of that mooring ring?

The Witness: Diameter of the ring itself was two inches.

The Court: Was that of solid steel?

The Witness: It was solid steel, yes, your Honor.

(Testimony of Soren K. Bach)

The Court: Do I understand that that part which appeared above the top of the float was about 12 inches high?

The Witness: That's right.

The Court: And that was one-inch steel?

The Witness: Two inches.

The Court: And did that continue clear through the four feet of the bottom of the float and then protrude the same distance underneath?

The Witness: No; the ring itself was welded onto the plate and protruded two inches through the plate, and then it was welded on both sides of the plate, both top and bottom.

The Court: How was the plate then attached to the top of the mooring float?

The Witness: It was bolted with one inch bolts clear around the plate. I would say approximately 18 one-inch bolts that went clear through the float.

The Court: Clear through to the bottom? [49]

The Witness: Yes, clear through to the plate on the bottom.

The Court: Was there a similar ring that you have described attached to the bottom of it?

The Witness: Yes.

The Court: Was it attached in the same way?

The Witness: Yes, bolts go clear through and attach to the plates.

The Court: And the ring, as you have called it—some have referred to it as a "U" ring?

Mr. Toner: "U" bolt.

The Court: You mean the same thing?

The Witness: Yes.

(Testimony of Soren K. Bach)

The Court: It is more in the shape of a "U" bolt than it is a ring, isn't it, Mr. Bach?

The Witness: That's right.

The Court: And that is of the same construction as the one you have described topside of the mooring float?

The Witness: Yes, your Honor.

The Court: All right.

Q. By Mr. Toner: Mr. Bach, will you draw a diagram of the mooring float that was involved in the Barge 4414 accident?

Mr. Scully: Just a moment. It hasn't been shown that this witness knows what float was involved. He has been asked [50] thus far as to his building of floats. I think it should be brought home into the evidence, if it can be, that he knows what float is in question here.

The Court: Just ask him about it, Mr. Toner.

Q. By Mr. Toner: Mr. Bach, are you familiar with the float that was involved in the Barge 4414 accident?

A. I built the float, but I could not say for sure whether it was a three- or four-layer.

Q. If it is a three-layer, it is three feet high, is that it? A. That is right.

Q. And if it is a four-layer, it is four feet high?

A. Yes.

Q. Otherwise you can describe it exactly?

A. Yes, sir.

Q. You may proceed.

(Witness makes a drawing.)

The Court: How many of those bolts were there going through?

The Witness: Approximately eighteen. They were all around the plate. They went clear around. All one-inch.

(Testimony of Soren K. Bach)

The Court: Go ahead, Mr. Toner.

Mr. Toner: I should like to have the paper—

The Court: Show it to Mr. Scully.

Mr. Scully: I am familiar with it, your Honor. I watched [51] the witness draw it.

Mr. Toner: I should like to have the paper marked as an exhibit, and offer it as Libelant's Exhibit No. 2.

Mr. Scully: No objection for what it is worth, your Honor.

The Court: Let it be received and marked as Libelant's Exhibit 2.

(The document referred to was marked Libelant's Exhibit 2, and was received in evidence.)

Q. By Mr. Toner: Mr. Bach, if this mooring float is a three-foot float, how far out of water would it float?

A. At that time it was comparatively new, and I would say—

The Court: Is there any use in asking if it was a three-foot float? Hasn't it been stipulated it was four feet?

Mr. Toner: Yes, that is correct.

The Court: I don't see any use in taking time asking about three feet.

Q. By Mr. Toner: If this is a four-foot float, Mr. Bach, as it has been described, how far out of water would it float?

A. I would say about 18 inches out of the water.

Q. Did you have charge of the repairs to Barge 4414 after she was damaged on March 31, 1945?

A. I did. [52]

Q. Did you see the barge when she was capsized?

A. After she was capsized?

(Testimony of Soren K. Bach)

Q. Yes. A. Yes; after she was turned over?

Q. Yes. A. I did.

Q. Where was she at the time?

A. She was at the mooring when I saw her. Not at the mooring; I mean at the dock where we repaired the barges.

Q. Will you describe the damage that you saw, indicating the place and the planks that were damaged?

A. I saw two planks that were busted clear through, a hole that took in about two widths, or the width of two planks, and they were busted down between the floor timbers. That is about all.

Q. What was the size of these planks?

A. They were 4 by 12.

Q. They were 12 inches wide?

A. 12 inches wide.

Q. 4 inches thick? A. Yes.

Q. Where with reference to the bottom end of the rake were these broken planks?

A. I would say in about 21 feet or so, and away from the sides. That is taking it from memory now. I would say [53] about 5 feet or so.

Q. 5 feet from where?

A. From the side of the barge and in.

Q. Which side?

A. On the port side. It was upside down when she came in, now.

Q. Do you mean the port side upside down, or do you mean the starboard side rightside up?

A. On the starboard side upside down, and on the port side rightside up.

Q. In any event, the hole was 5 feet from the side of the barge? A. That is correct.

(Testimony of Soren K. Bach)

Q. Did you see any scratches or other marks on adjacent planks?

A. There were scratches—in my memory there was a scratch there that was approximately 8 feet long, as I recall it.

Q. In which direction did the scratch run?

A. It was not straight on the barge. It went like from the outside and come diagonally down to the hole.

Mr. Scully: Just a moment. May it please your Honor, might I have that answer read back again? If your Honor will permit me, I would like to stand over here, because I cannot hear. [54]

The Court: You may stand there, and you may sit at this other table, if you desire.

Mr. Scully: I am perfectly satisfied if this is all right.

The Court: Read the question and answer, please.

(The question and answer were read by the reporter.)

Q. By Mr. Toner: Was there anything, particularly, about the scratch that would enable you to determine what had caused the scratch?

A. Not on the scratch itself, but on the plank before where the hole actually was there was an indentment which you could see was made with a round object, and I just presumed that was the ring of the barge that did that.

Q. How large was this indentation that you saw?

A. You mean in the plank previous—

Q. How big was it and how deep was it?

A. I would say, as I recall, about three-quarters of an inch, maybe less.

Q. Deep?

A. Yes, in the edge of the plank that wasn't taken out of there.

(Testimony of Soren K. Bach)

The Court: I don't know whether this is clear or not. Read the last two or three questions and answers, please.

(The record was read by the reporter.)

The Court: Do you mean the ring of the barge? [55]

The Witness: No; the ring of the float.

The Court: Go ahead.

Q. By Mr. Toner: How far was it from the hole up to the mooring bit of the barge around forward of the rig?

The Court: Is that question clear to you?

The Witness: Yes. I was just trying to figure the distance.

As far as I can figure, it would be between 40 and 50 feet, it looked to me.

Q. By Mr. Toner: Was the barge's bottom clean?

A. Fairly clean, yes.

Mr. Toner: That is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Bach, you described these floats which you built. Did you build all of the floats which were used at the mole job for the Atkinson people?

A. No, I didn't.

Q. Did you supervise their building?

A. Not all of them.

Q. How many floats were there there on the 31st of March, 1945, if you can recall?

A. I am afraid I couldn't give any figure on that. I would just have to completely guess.

Q. Two or four? [56]

A. No; I would say probably twelve.

(Testimony of Soren K. Bach)

Q. In use at the job there, along in front of the job?

A. Not laying out in that little area. I thought you meant in the whole harbor area of the Guy F. Atkinson Company.

Q. I mean the Atkinson floats.

A. About twelve.

Q. Did all of the floats that you built have identical construction, with the possible exception of three or four planks? Some were three and some were four, as I understand it. Other than that were they all identical?

The Court: I don't believe he said planks. I think he said some were three feet and some were four feet.

Q. By Mr. Scully: Other than the fact of some being three feet and some four feet, were the other dimensions identical? A. I believe they were.

Q. Could it be possible that there were different-sized "U" bolts used? A. That is possible.

Q. Roughly, I know you can't recall exactly, about how many floats would you say you have built?

A. I would say six.

The Court: All for the Atkinson Company?

The Witness: Yes.

Q. By Mr. Scully: Did each one of those, Mr. Bach, have [57] a "U" bolt standing clear of the topside of the float of about 12 inches? A. Yes.

Q. Every one of them did?

A. Yes, even the floats they brought in. They rented some from the Navy. They had the same "U" bolts on them.

The Court: Read the answer.

(The answer was read.)

Q. By Mr. Scully: Referring now, Mr. Bach, to the scratches that you observed and the indentations on the

(Testimony of Soren K. Bach)

hull, I will draw a rectangle which we will say is the bottom of the barge after she is turned upside down, and we will just pick out any place in here and put a mark which we will call "B-1" for the hole through that you saw.

Mr. Toner: If the court please, I think I would rather have the witness place the mark.

Mr. Scully: I am going to have him place it. This is preliminary. I just want to orient him on the map here. We are just placing that. We will put the bow over here.

Q. By Mr. Scully: Now will you take the pencil and indicate—

A. If I remember correctly, the hole was here (indicating).

Q. You may re-place it if you wish.

A. As I remember, approximately 8 feet. [58]

The Court: Talk a little louder.

The Witness: Approximately 8 feet. It run in a line about like this (indicating). That is about as I remember it.

Q. By Mr. Scully: A line running outboard towards the side?

A. Outboard, that is the way I feel I remember it.

Q. Will you point out where you saw this approximately three-quarter-inch indentation?

A. If we had, say, this plank here, or this hole here, this hole, if I remember right, was—

The Court: A little louder.

A. This hole, as I remember, was approximately like this (indicating); here was one plank here, and another plank here, and the indentation was right in the next plank here, which I did not remove at the time.

(Testimony of Soren K. Bach)

Q. By Mr. Scully: These planks ran across the bottom of the barge? A. That is right.

The Court: This hole, then, wasn't round, but rather elongated, is that it?

The Witness: Yes.

Q. By Mr. Scully: And bearing towards the outside of the float as distinguished from the bow—

A. Approximately the way I have got it here (indicating). [59]

Q. And this indentation appeared to you as though something had smacked the round object against the bottom of the boat? A. That is right.

Q. Did you see more than one of those—

The Court: The bottom of the boat?

Mr. Scully: Yes, your Honor, of the barge. We are looking at the barge capsized now, and the witness has testified that he saw this rounded indentation about three-quarters inches as though something had been jammed up against the bottom and driven part way into the plank.

Q. By Mr. Scully: Am I correct in that?

A. Right.

Q. Did you see more than one of those type of indentations? A. I did not.

Mr. Scully: We offer this, your Honor, as Respondents' A.

The Court: Let it be received and so marked.

(The paper referred to was marked Respondents' Exhibit A, and was received in evidence.)

Q. By Mr. Scully: You stated an estimate of what the measurement would be from the hole in the hull to the starboard bit, I believe it was, on the topside of the barge. Did you take into account that your measure-

(Testimony of Soren K. Bach)

ment would be at least partially along a circular course? [60]

A. That is what I was trying to figure out.

Q. You didn't use any mathematics or any figures in that?

A. No, I didn't. I figured I was on a 12-foot radius, approximately.

Q. 12-foot what? A. Radius of a regular barge.

Q. Do you recall which side of the barge the hole, the point of damage was nearer to? The port side or the starboard side?

A. The starboard side. That is with the barge right-side up.

Q. And about five or six feet inboard in the starboard side? A. That's right.

Mr. Scully: That is all, your Honor.

Mr. Toner: No redirect examination, your Honor.

The Court: You are excused.

Mr. Toner: Call Mr. Raimer.

EDWARD M. RAIMER,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Edward M. Raimer. [61]

Direct Examination

By Mr. Toner:

Q. What is your residence, Mr. Raimer?

A. 2134 Golden, Long Beach.

Q. Your present occupation?

A. Superintendent on the Hyperion Outfall Sewer.

(Testimony of Edward M. Raimer)

Q. Who was your employer?

A. The Guy F. Atkinson Company.

Q. What previous experience have you had around the harbor, particularly with reference to mole and harbor construction.

A. I have been indirectly involved in the towing of rock for the past nine years, from the Catalina quarries to the Long Beach breakwater, and also to the mole job, and Reese Field, Redondo Breakwater, and Hueneme Jetty.

Q. What was your position on March 31, 1945?

A. I was assistant project manager on the mole job.

The Court: For whom?

The Witness: For the Guy F. Atkinson Company.

Q. By Mr. Toner: What were your hours of work?

A. Twenty-four, just about.

Q. What shift were you on?

A. I was responsible for the towing of the rock, and of course I was subject to call. However, my hours were, you might say, from 7:00 in the morning until 6:00 in the evening. [62]

Q. Where were you when Barge 4414 was damaged?

A. I was at home.

Q. When did you first hear about the damage to the barge?

A. Approximately 7:00 o'clock the following morning.

Q. When you came to the job?

A. When I came to the job.

Q. What did you see at that time?

A. Well, at that time I didn't see anything. They didn't have the barge turned, if I remember rightly, by that time. I am not certain of that.

(Testimony of Edward M. Raimer)

Q. Did you later see the damage to the barge?

A. I did.

Q. Where was she at that time?

A. She was moored alongside the work trestle.

Q. Was she capsized or rightside up?

A. She was capsized.

Q. What did you observe as to the damage she had sustained?

A. Two of the bottom planks were bashed in, approximately 21 or 22 feet from the rake, and approximately 5 to 6 feet in from the side of the barge.

Q. How large a hole— A. Starboard side.

Q. Did that make a hole right through the bottom of the [63] barge? A. That is right.

Q. How large a hole did that make?

A. It was a jagged hole, of course, and I imagine it covered approximately 6 to 8 square inches.

The Court: Read the answer.

(The answer was read.)

The Court: 6 to 8 square inches?

The Witness: That is the opening, yes.

The Court: Do you mean 6 to 8 square inches? Would you say 2 by 4 inches, is that what you mean?

The Witness: That is right. That much area.

The Court: 6 to 8 square inches was the hole?

The Witness: That's right, sir.

Q. By Mr. Toner: Did you make an examination of the damage? A. Yes, I did.

Q. Do you have an opinion as to the manner in which this damage was caused?

Mr. Scully: Go ahead.

A. Well, I was of the opinion that the damage was—

(Testimony of Edward M. Raimer) .

Mr. Scully: Just a moment.

Q. By Mr. Toner: Just answer yes or no whether you have an opinion. A. Yes. [64]

Q. Will you state that opinion?

Mr. Scully: Just a moment, Mr. Raimer. Counsel has not qualified this witness other than as a superintendent on a construction job and as a construction superintendent. This is a matter of marine damage to vessels, which is a much different thing than building moles and the like, and I submit the witness is not qualified to give his opinion on that.

Mr. Toner: If the court please, he has testified he was in charge of having the rock brought over to these various jobs from Catalina for a period of nine years. I think he is thoroughly qualified to testify as an expert.

Mr. Scully: Of course, your Honor, a man on a passenger liner might say he was in charge of bringing passengers over the route from Australia for many years, but he couldn't testify as to what the cause of grounding might be, or collision. That is entirely different. I still submit that the objection is well taken.

The Court: I think he should be qualified further.

Q. By Mr. Toner: Mr. Raimer, did you have, during the course of your experience, occasion to examine damage to various barges?

A. Yes, I did. That was part of my job. In other words, I had to provide for the dry-docking of barges that were seriously damaged, and also—

Q. Did you have charge of the maintenance of barges [65] similar to Barge 4414? A. Indirectly, yes.

Q. Have you examined various other damage to the bottom of similar barges?

A. Yes, I have examined damaged barges.

(Testimony of Edward M. Raimer)

Q. Was that part of your work during the nine years you referred to? A. That is right, sir.

Q. Will you state your opinion as to the cause of damage to Barge 4414?

Mr. Scully: Just a moment. May it please your Honor, I repeat my objection for the reason that all of that experience would give him very adequate knowledge as to how to repair them, but it would have absolutely no bearing as to what caused them. We have got issues here concerning seamanship, and the method of mooring barges and the like; not on matters of construction, the way to put in planks, or the type of materials used, and the way it is put together. That is all in the witness' field, but not the cause of damage. That is substantially different, your Honor.

The Court: The objection is sustained.

Q. By Mr. Toner: How did the size of the hole in the bottom of Barge 4414 compare with the "U" bolt in the mooring floats which were being used at that time?

A. The indentation could have been made by a bar the [66] size of the "U" bolt in our mooring floats.

The Court: Didn't you cover that in the stipulation?

Mr. Scully: Yes, there is no dispute about that.

Q. By Mr. Toner: Basing your answer upon your experience in harbor construction work, assume a barge similar in description, dimensions, draft to Barge 4414, loaded with 879 tons of rock with two to three feet of freeboard at the bow and six to eight inches of freeboard at the stern; assume further that said barge was properly moored to a mooring float similar in dimensions and description to the floats we have been talking about, and similar to the floats used on the Terminal Island mole

(Testimony of Edward M. Raimer)

construction job; and assume further that the wind was negligible, that the water was at or near high tide, and that the ordinary currents and surges of Los Angeles Harbor were present: state whether or not you have an opinion as to whether it is possible for such a barge to override said mooring float by the action of the wind and the currents without any intervening motive force.

Mr. Scully: Just a moment, may it please your Honor. I repeat my objection. It is the same question in the form of a hypothetical question now. The witness has already clearly shown the limits of the field of his qualification. He has no qualification on towing as such. He has qualifications for building barges, constructing barges, and building moles, and the like, but not the navigation of tugs in tow. [67]

The Court: The objection is sustained.

The court will take a recess at this time, Mr. Toner, until 2:00 o'clock.

I think you should further qualify this witness upon the point urged in the objection by Mr. Scully.

(Whereupon, at 12:00 noon a recess was taken until 2:00 o'clock p. m. of the same day.) [68]

Los Angeles, California, Tuesday, December 16, 1947.

2:00 P. M.

Mr. Toner: If the court please, Mr. Scully has obtained some tide information, which we are perfectly willing to stipulate may be read into the record.

Mr. Scully: May it please your Honor, I took this from the records of the United States Coast and Geodetic Survey in this building at the noon hour. Those records

show the actual recordation of the tides at Los Angeles Harbor on March 31, 1945, and the first two tides on April 1, 1945.

Low tide on March 31 was at 5:30 A. M. Daylight Saving Time, with a tide of .41 feet. High tide following—

The Court: Point what?

Mr. Scully: .41 feet. 41/100 feet.

High tide, following that low tide, or flood tide as it is also called, was at 11:42 A. M. on the 31st of March. It measured at 3.81 feet.

The next low tide on the 31st of March, 1945 was at 5:06 P. M.

The Court: Still on March 31st?

Mr. Scully: Yes.

The Court: What time?

Mr. Scully: Six minutes past five P. M. It measured at 1.41 feet.

The Court: The first low tide was 41/100 of a foot? [69]

Mr. Scully: Yes, 5:30 A. M. on the 31st.

The Court: April?

Mr. Scully: We haven't got the last tide on the 31st, your Honor, of March, which occurred at 11:30 P. M. on the 31st of March. It measured at 4.91 feet.

Now we go to the 1st of April. 6:12 A. M. Low tide .61 feet.

Although it probably will not be material to this inquiry, I do have the figures on the high tide following that on the 1st of April, which occurred at 12:30 P. M., 30 minutes past noon on the 1st of April. It measured at 3.61 feet.

Mr. Toner: It is stipulated by the libellant that those figures are correct.

Mr. Raimer.

EDWARD M. RAIMER,

called as a witness by and on behalf of the libelant, having been previously sworn, resumed the stand and testified as follows:

Direct Examination (Resumed)

By Mr. Toner:

Q. Mr. Raimer, will you explain to the court what your duties were in connection with the mole job, in detail, please?

A. Well, I was interested in any problem or course that would concern the management. However, I probably spent the majority of my time dispatching the towboats, chartering the towboats, surveying the barges after there had been an accident, [70] making out the report, getting dry-dock space for them in case we had to dry-dock them. We used to dry-dock them before we turned them over in order to do a repair job on them. In other words, I can only testify as to that which I—the information I would get from the field through the men, and from my own observances while making the surveys of the accident.

Q. What did you have to do with the mooring of the barges?

A. I was responsible for the tow, of course, from the time the boat left with the empty barges, went to Catalina, and the barges were loaded and then towed to the mainland, and responsible until they were made fast.

Q. What do you mean by you were responsible for them?

A. In other words, if there was an accident, towing accident, or a barge happened to lose a load, due to a marine accident, or due to a storm, why, it was up to me to come up with the answers as to what had happened.

(Testimony of Edward M. Raimer)

Q. Did you have charge of that feature of the job?

A. That's right.

The Court: He had charge of what feature, now?

Mr. Toner asked if you had charge of that feature. You had charge of what feature? When a tug was bringing in, say, a barge to be moored, did you have anything to do with that?

The Witness: Only in that I was responsible for the [71] tow, your Honor. In other words, if there was an accident chargeable to towing, why, that was my responsibility, to investigate.

The Court: Were you out there to watch them when they came in and made the barges fast to the floats?

The Witness: Quite often. In fact, I have been down in the holds when the barge has been sinking. Personally helped plug one hole while the barge was sinking.

The Court: That was after the collision or whatever it was that caused the hole—was there a hole in the bottom of the barge that caused it to be sinking?

The Witness: That's right, sir.

The Court: Were you in there at the time that it struck?

The Witness: No, sir.

The Court: You went there afterwards?

The Witness: That is right. I would hear, either by phone or radio, that the barge was in distress, and then I would get on a water taxi and—

The Court: When the tugs came in with their tow, did you have anything to do with the method of their being made fast to the floats?

The Witness: Well, only—of course that was a cut and dried method that we have used for years. I would

(Testimony of Edward M. Raimer)

order, say, for instance, the pendants made up that we anchored the barges with, and also the floats built, and also purchased the [72] anchors, and had the pendants made, that is at our rigging loft, gave them the sizes, of course, and the length needed for the anchor pendants and crown buoys, and anything connected with the mooring gear.

The Court: As I understand it, then, you had charge of the bringing in of the tows from outside into the harbor or to wherever they were moored?

The Witness: That's right, sir.

The Court: Were you on any occasions present at a time when tugs came in with their barges in tow and made them fast to the floats?

The Witness: Many times, sir, many times.

The Court: You might ask him more about that, Mr. Toner.

Q. By Mr. Toner: How many times would you say you were present at a time barges were moored?

A. Possibly one hundred.

Q. How many barges did you have on this job?

A. Well, now, I think we had about 14 barges. That wouldn't be off more than one or two barges.

The Court: Some of them were brought in every day?

The Witness: That is right.

The Court: Of course you weren't present every time each one of them came in?

The Witness: No, sir; but we tried to make—

The Court: When they did come in did you observe the [73] method used in making them fast to the floats?

The Witness: Quite often, yes, sir.

The Court: Go ahead.

(Testimony of Edward M. Raimer)

Q. By Mr. Toner: Was there any special method that was used to moor these barges?

A. There is only one method that I have ever observed. It is the same one. They come in, of course—

Mr. Scully: Just a moment, may it please your Honor. We are getting into custom, procedure and usage. Before the witness goes into the opinion evidence, which counsel is obviously going to ask him, I should like to ask permission to take the witness on voir dire, if I may have the privilege.

The Court: This objection is overruled. Read the question.

(The question and answer thus far were read by the reporter.)

Q. By Mr. Toner: Finish and describe the method.

A. They have a towing bridle attached to the barge in tow, that is, two pendants, the two pendants are fastened to a ring which is fastened to the towing line.

Q. Pardon me. Perhaps it would be simpler if you drew a diagram of a barge.

The Court: Don't we have enough barges there without having him draw any more?

Mr. Toner: I wanted it drawn on 'a little smaller scale, [74] because he describes a pendant.

The Court: Go ahead.

The Witness: These pendants are about 90 feet long, 90-foot pendants. They fasten to each bit, one to each corner bit on the bow of the barge, and then when the tow is brought in, of course the speed is cut down, and when it nears the mooring float one of the pendants is lifted, and then as it comes close enough to the float to get hold of the other pendant—sometimes if there happens

(Testimony of Edward M. Raimer)

to be a crew on hand, why we have a man on board the float, quite often we just use the pipe pole and lift the pendant off the float and secure it to the bit that they have taken the bridle off of. It all depends on which side of the barge the float happens to be on as to which bridle is removed. That is a ring there, and it fastens into the towing line (indicating).

Q. By Mr. Toner: Will you indicate where the bits are? A. The bits are right here.

Q. And one on the port corner?

A. Yes. (Indicating.)

Q. Have you completed your description of the mooring, Mr. Raimer?

A. Yes, that is right. After the bridle has been lifted the mooring pendant is slipped over the bit.

Q. Is it necessary for the barge to be at a complete stop for that operation to be performed safely? [75]

A. No. It is very seldom at a complete stop. I don't believe I have ever seen one.

Q. Is there any danger associated with mooring?

A. Well, if the barge is expelled at too rapid a rate the barge is liable to hit the mooring or override the mooring.

Q. What do you mean by override the mooring?

A. By overriding the mooring, if the barge happens to hit on the rake of the scow—

Q. You mean the mooring float hits on the rake of the scow?

A. If the barge—I mean if the mooring float hits the rake of the scow the barge is liable to pass over the top of the float.

Q. What is the danger if that happens?

(Testimony of Edward M. Raimer)

A. Well, when the anchor line becomes taut, of course your float will probably be—would be in a vertical position, that is, perpendicular to the bottom of the scow, and when the line becomes taut that will throw the top of the float into the bottom of the barge.

Q. Is that likely to cause damage to the barge?

A. Yes, it would, because you are towing in the neighborhood of 1200 tons there, plus the weight of your float.

Q. Did you examine the damage to this Barge 4414?

A. Yes, I did. [76]

Q. As a result of your examination do you have any opinion as to the cause of the damage?

The Court: Do you have some voir dire questions now?

Mr. Scully: I have an objection, your Honor, that this witness is not qualified. May I ask him a couple of questions to bring that out further?

Q. By Mr. Scully: Mr. Raimer, you testified before luncheon that your status was that of construction superintendent at the mole, I believe, was it not?

A. Assistant project manager.

Q. Assistant project manager? A. That's right.

Q. You have testified that you were responsible for the barges being towed from the time they started for Catalina empty, picked up a load of rock and came back to the job? A. That's right.

Q. So you were, in fact, responsible under your status and your duties and your job on the evening of March 31, 1945 for the Barge 4414, is that correct?

A. That's right.

Q. And you were, therefore, responsible not only when she entered the Los Angeles Harbor, but throughout the

(Testimony of Edward M. Raimer)

time that the Rocona took her to her mooring float in question? A. That's right.

Q. And thereafter? [77] A. That's right.

Q. Have you ever moored a barge of the type of 4414? A. Have I ever moored one?

Q. Yes, have you ever been aboard either the barge or the towing tug?

A. I have been on board the towing tug.

Q. Have you directed that operation?

A. I have never directed the operation, no.

Q. You stood by and watched it, is that right?

A. That's right.

The Court: You say you have never directed it yourself. What was your part there, Mr. Raimer? What were you doing there?

The Witness: To see that the operation was carried out properly.

The Court: Was it your responsibility and right if it were not being carried out properly to cause it to be carried out properly?

The Witness: Positively.

The Court: Go ahead.

Q. By Mr. Scully: Did you ever, in fact, give an order to the master of a tug engaged in a mooring operation of a barge?

A. Engaged in a mooring operation?

Q. Yes. [78]

A. I couldn't answer that. I have often told the towboat captains, of course, to go out and pick up a barge and moor it.

Q. Mr. Raimer, perhaps I didn't make myself clear. We are assuming now that tug "X" is in the act of bring-

(Testimony of Edward M. Raimer)

ing a barge up to a mooring float, preparatory to making fast to the mooring float; that involves certain maneuvers to the tug, doesn't it, and the barge?

A. That is right.

Q. Have you at that time under those circumstances ever given an order to the master of the tug engaged in that maneuver?

A. It was never necessary, sir. The towboat captains that were under our employ had been doing that type of business for years.

Q. And you left it up to them?

A. That is right, sir.

Q. It was their field of specialty, as it were, to do that job and do it properly?

A. Do it properly, that is right.

Q. And you relied upon them to do it, did you not?

A. If they did not do it properly, then of course we could take recourse.

Q. That was disciplinary action and discharge and so forth? [79]

A. Get another tug boat, yes.

Q. At that time and place under the towing maneuvers going on at the time of mooring a given barge, you looked to the towing tug master who was in charge of her to do that job properly, didn't you?

A. That is right, that is why we hire experts, sir.

Q. And you didn't consider yourself at that time authorized to give an order?

A. If an order was needed to be given, I would give the order, yes, sir. I had a perfect right to do that.

The Court: And you saw a great many of these barges brought in and moored?

The Witness: That's right, sir.

(Testimony of Edward M. Raimer)

The Court: Some of them while you were on the tugs themselves?

The Witness: That's right.

Q. By Mr. Scully: Were you ever aboard either the tug or a barge at time of mooring when she suffered damage from the float?

A. Not from the float, no, sir.

Q. Have you upon occasion observed barges overrun or go over the top, under some circumstances or other, a mooring float? Have you seen that done?

A. Personally I have never seen one pass over a float.

Mr. Scully: I submit, your Honor, this witness is still [80] a construction man and not a marine man.

The Court: Have you ever seen one after it had passed over a float?

The Witness: Yes, sir.

The Court: Under what circumstances?

The Witness: Have I ever seen a barge, you mean?

The Court: Where a barge has passed over a float while it was being attempted to be moored.

The Witness: No, sir, I haven't.

The Court: Any further questions, Mr. Toner?

Q. By Mr. Toner: Have you ever seen any damage to a barge caused by a mooring float?

A. This particular barge is the only one that I have ever seen.

Q. Have you ever seen any scratches on the bottom of a barge caused by a mooring?

A. I have seen scratches from what we believed has been the result of towing over the mooring float.

The Court: I don't believe he can testify to that question, Mr. Toner. He has described the jagged hole that

(Testimony of Edward M. Raimer)

has been made, and the size has been stipulated to by the plaintiff.

Mr. Toner: I believe he also testified that the hole was about the approximate size and shape of the mooring—

The Court: You have stipulated to that. [81]

Mr. Scully: We raise no point about that. I am willing to stipulate that it was so observed.

Q. By Mr. Toner: Mr. Raimer, basing your opinion on the examination of the damage to Barge 4414, will you state whether or not it is possible for this barge to have made the trip across from Catalina Island with a hole of that nature in her?

A. That would be impossible.

Mr. Scully: Just a minute, Mr. Raimer, please. I move that that portion of his answer go out, and that my objection be entered, your Honor, that this witness is not qualified to express an opinion on that matter.

The Court has already ruled on that field.

Mr. Toner: If the court please, I think the witness has seen many barges, he has been in charge of the towing operation, he was the man in charge of bringing these barges over from Catalina to this job, as well as to other jobs, I believe.

The Court: I think the answer may stand.

Q. By Mr. Toner: The answer was—

The Court: The answer is in the record. Just have the record read.

Mr. Toner: Will you read the answer, please?

(The question and answer were read by the reporter.)

Q. By Mr. Toner: Mr. Raimer, basing your opinion on your examination of the hole in this barge's bottom,

(Testimony of Edward M. Raimer)

will you [82] state what the possibilities are of the cause of such damage?

Mr. Scully: Just a moment, Mr. Raimer. I reenter my objection, your Honor. I think that is directly in the face of what your Honor observed, that this witness is not qualified to express an opinion as to causes.

The Court: I think it is the same question in another form, Mr. Toner.

Mr. Toner: This question is based upon his examination of this particular damage, rather than the previous question having been based upon his experience.

The Court: Wouldn't that be just a question that anyone could answer? That would be a question of physics, would it not?

We have here the description of the "U" bolt, we have a description of the hole; it doesn't require an expert, in other words, to answer that question. The objection is sustained.

Q. By Mr. Toner: Mr. Raimer, when Barge No. 4414 was loaded with 879 tons of rock, how much of the barge itself would be under water, assuming that she is on an even trim? A. Approximately 9 feet.

Mr. Scully: We have an agreement in our stipulation as to what the conditions were here concerning this barge. I don't think it is necessary to clutter the record. I am not really objecting to it, but I want to point out we have [83] covered the point and are losing ground here.

Mr. Toner: If the court please, that is not in the stipulation. The question is how much of the barge was under water, how deep did she ride in the water, what was her draft?

Mr. Scully: You mean the draft of the vessel?

(Testimony of Edward M. Raimer)

Mr. Toner: Yes.

Mr. Scully: I beg your pardon. I misunderstood.

The Court: You may answer it.

A. The barge at that time showed about three feet of freeboard in the bow and about 18 inches of freeboard in the stern, and the overall draft of the barge is 12 feet, so an average depth there would be approximately 9 feet, that is, 9 feet of barge was submerged.

The Court: Just explain what you mean by freeboard.

The Witness: Freeboard is that part of the barge that is above water level.

The Court: I think that, in substance, is covered in the stipulation, isn't it?

Q. By Mr. Toner: Mr. Raimer, do you know whether this barge was manned by any of the Guy F. Atkinson people at the time of the crossing?

A. There were no Guy F. Atkinson employees aboard the tow. It was a chartered towboat.

Q. Will you explain that, please? [84]

A. The towboat was rented or chartered from the Case Construction Company.

Q. And whose employees were on the towboat?

A. Case Construction Company's employees.

Q. By whom were they paid?

A. They were paid by the Case Construction Company.

Q. Did Guy F. Atkinson have any part in paying them?

A. No. Well, we paid a daily rate for the towboat.

Q. Do you know how much that rate was?

A. \$300 per day.

Mr. Toner: No further questions?

(Testimony of Edward M. Raimer)

The Court: I am just looking at this stipulation. It may be that the court's statement was in error about the freeboard.

Mr. Scully: I think the freeboard is stipulated to, your Honor. I don't think the draft was.

The Court: I thought I saw it in there, but I do not now see it. There is a statement of what the libelant claims as to the freeboard.

Mr. Toner: That is what the respondent claims as to the freeboard.

The Court: As to what the respondent claims, yes. But I do not see any stipulation of fact with regard to it.

Mr. Scully: I don't think we are far apart. I think we have both got the same items. Is that the way you under- [85] stand it?

Mr. Toner: Yes. This witness testified the freeboard was 18 inches at the stern, and I believe that respondent's position is it was 6 or 8 inches at the stern.

Mr. Scully: The net result is she was high at the bow and low in the water at the stern.

Mr. Toner: And she had 3 feet of free water at the bow, we both agree on that. Therefore she must have been about 9 feet below water at the bow.

The Court: I had that in mind when I said it was substantially stated in the stipulation of facts, but I want to be sure about it.

Mr. Toner: I have one more question.

The Court: Mr. Goldstein, turn back to the witness' testimony regarding the freeboard and the draft, and read it, please.

(The record was read by the reporter.)

(Testimony of Edward M. Raimer)

The Court: In other words, this statement you made, Mr. Raimer, about there being 1½ feet of freeboard on one end and 3 feet on the other, that is on the basis that with this load, and the boat was in trim as you all it—is that correct? Would it be that way?

The Witness: That is right, sir, the barge would have to be in trim. When you calibrate your carriage you take your calibrations from all four corners and average the [86] readings.

The Court: If she is riding properly the freeboard would be just about as you have stated, and the draft would be on an average of 9 feet?

The Witness: That is right, sir.

Q. By Mr. Toner: Did you have access to the records kept of the trips of these various barges?

A. Yes, I had all the logs.

Q. Did you examine the log with reference to the load of Barge 4414? A. Yes.

Q. And the records and the log of Barge 4414 are what you are basing your present testimony on, is that right? A. That is right.

Q. When Barge 4414 was so loaded and so trimmed was she seaworthy for a trip across the Catalina Channel?

Mr. Scully: Objected to, your Honor, as not within the field of this witness' knowledge as an expert. He is not a marine man and hasn't purported to be.

The Court: Well, there is some question about that, Mr. Toner. I don't think you had better proceed with that. While Mr. Raimer had general charge of these matters, he left the transportation to the master of the tug.

Mr. Toner: That is correct, it is a chartered transportation. [87]

That is all.

Mr. Scully: No cross-examination.

The Court: You are excused, Mr. Raimer.

Mr. Toner: I call Mr. Scheibe.

FRITZ A. SCHEIBE,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Fritz A. Scheibe.

Mr. Toner: If the court please, I should like to offer the sketch that Mr. Raimer has drawn of the mooring bridle, towing bridle, as Libelant's Exhibit 3.

The Court: It may be received.

(The drawing referred to was marked Libelant's Exhibit 3, and was received in evidence.)

Direct Examination

By Mr. Toner:

Q. Mr. Scheibe, what is your residence?

A. Rolling Hills, California.

Q. What is your occupation?

A. Marine surveyor.

Q. How long have you been a marine surveyor?

A. Twenty years.

Q. What marine experience have you had in addition to the experience you had as marine surveyor? [88]

A. I have an unlimited master's license in steam.

Q. Did you on behalf of libelant examine Barge 4414 shortly after March 31, 1944?

(Testimony of Fritz A. Scheibe)

A. I examined Barge 4414 in the interest of the underwriter who had the barge insured at that time.

Q. Describe the damage, please.

A. May I refer to the report I wrote covering that accident?

Q. Yes.

Mr. Scully: Just a moment. May I ask the witness a question on voir dire as to that?

The Court: Yes.

Q. By Mr. Scully: Mr. Scheibe, would you be able to testify as to your observations and your knowledge of those facts independently and without reference to the report of survey?

A. State that again, will you please?

The Court: Read the question.

Q. By Mr. Scully: Can you tell your story without looking at the report of survey? Do you know what happened or what you saw, rather, without the report of survey to refresh your recollection?

A. I believe I could.

Mr. Scully: Proceed, counsel.

The Court: It is not necessary to show it to him if he [89] can do it.

Q. By Mr. Toner: Mr. Scheibe, will you describe the damage that you found to Barge 4414?

A. When I saw Barge 4414 it was in a capsized condition alongside of the dock at the mole, and there was a hole in the bottom, I believe, in planks No. 22 and 23 aft of the foreward rake, about 5 feet in from the star-board side of the barge.

(Testimony of Fritz A. Scheibe)

Q. Will you describe the approximate size and shape of this hole?

A. The hole was approximately 3 inches wide and extended through one complete plank, the width of one complete plank, and partly into a second plank.

Q. Are you familiar with the mooring—

The Court: I wouldn't know just how great the length was.

The Witness: The planks are 12 inches wide.

The Court: It would be just somewhat more than 12 inches long?

The Witness: Yes, sir.

Q. By Mr. Toner: Are you familiar with the mooring floats that were used on the Terminal Island mole job?

A. I only saw them laying in the water.

Q. Did you see a "U" bolt in the top of these mooring floats? [90] A. I did.

Q. Will you describe the hole in the bottom of Barge 4414 with reference to its similarity or dissimilarity to a "U" bolt such as you have described?

A. The hole that I saw in the bottom of the barge had the appearance of having been made by a "U" bolt.

Q. Were there any other marks or gouges or scratches on the bottom of this barge?

A. There were some marks extending forward on the barge from the hole toward the starboard edge of the barge. It appeared to be a groove caused by a round object.

Q. How wide was the groove?

A. From approximately 2 inches at the hole extending to nothing for a distance of 7 or 8 feet forward of the hole.

(Testimony of Fritz A. Scheibe)

Q. How deep was the gouge at its deepest point?

A. Where the hole was, the gouge was approximately a half inch to an inch deep.

Q. Mr. Scheibe, basing your opinion upon your experience as a marine surveyor, and upon your maritime experience, do you have an opinion as to the cause of the damage you saw in Barge 4414?

A. It was my opinion—

The Court: No. First answer it yes or no.

Q. By Mr. Toner: Do you have an opinion?

A. Yes. [91]

Q. State that opinion.

A. It is my opinion that the barge overrode a mooring float and that the eye—the “U” bolt punctured the bottom planking.

Q. Mr. Scheibe, do you have an opinion concerning whether or not it is possible for a barge to override a mooring float by the ordinary action of the wind and waves and currents and surges in the Los Angeles Harbor at that time and place?

A. Do I have an opinion?

Q. Yes. A. Yes, I do have.

Q. Will you state that opinion?

Mr. Scully: Object to the question on the ground not that the witness may not be qualified to give his opinion that he has as to the possible cause, but now when we delve into the realm of could it have been possible for it to happen in any other manner than such and such, I think we are going very much afield and into the field of speculation, and not getting credible evidence from a witness who is without question a reliable and qualified surveyor. I think we are asking him to stretch his field

(Testimony of Fritz A. Scheibe)

quite a bit when we ask him, could it be possible for anything else to happen.

The Court: Read the question, please.

(The record was read by the reporter.) [92]

The Court: Before he can answer that question, I think he would have to show that he knew what the ordinary operation of the wind and the waves and the surge was.

Mr. Toner: You see, if the court please, we have in our pre-trial stipulation the fact that the wind was negligible, and that the ordinary currents and surges of Los Angeles Harbor were present.

The Court: That may all be true, but there is an objection here as to the qualification of this witness to answer the question.

Q. By Mr. Toner: Mr. Scheibe, are you familiar with the ordinary currents and surges of the Los Angeles Harbor?

A. I am. I have a pilot's license for Los Angeles Harbor.

Q. How long have you been familiar with the currents and surges of Los Angeles Harbor?

A. Since 1926.

Q. Will you answer the question—

The Court: That ordinary condition, does it prevail generally throughout Los Angeles Harbor, Mr. Scheibe?

The Witness: Yes, sir.

The Court: This question is assuming that there were no unusual circumstances of wind or waves or current. Now will you put your question again, please, Mr. Toner?

Mr. Toner: I think I would rather have the question [93] read, if the court please.

(Testimony of Fritz A. Scheibe)

The Court: If Mr. Goldstein can find it.

(The following question was read by the reporter:

“Mr. Scheibe, do you have an opinion concerning whether or not it is possible for a barge to override a mooring float by the ordinary action of the wind and waves and currents and surges in the Los Angeles Harbor at that time and place?

“A. Do I have an opinion?

“Q. Yes. A. Yes, I do have.

“Q. Will you state that opinion?”)

The Court: The objection is overruled. You may answer it.

A. With the ordinary and usual conditions of the current and tide and surge in the harbor, the barge would not override that float or similar floats.

Q. By Mr. Toner: Why not?

A. There is not enough force with either the wind, the tide, or the surge to force that barge over a float of that size.

The Court: Would there be enough force with the combination of all in the same direction to do it?

The Witness: Not with the usual winds and tides and surges. [94]

The Court: That is what the question is, just the usual. It does not refer to any unusual conditions.

Q. By Mr. Toner: Would it take some additional force or motive power to bring this barge up on a mooring float such as we have been describing?

A. It would.

(Testimony of Fritz A. Scheibe)

Q. Will you describe what happens to a barge similar to Barge 4414 when she gets a hole in her the size and shape that you observed?

A. When a barge is loaded, such as this one is reported to have been loaded, and water leaks in, it becomes free water in the barge. There are no solid bulkheads to shut it off and to keep the water in one particular section. It results in all the water going to one side of the barge. When there is sufficient water in the barge to list her over, part of the load will slide off. The barge will then roll in the opposite direction, the water will run to the opposite side, and probably the remainder or a good part of it will slide off on the other side, until the barge comes back into an upright position.

Q. About how long would it take for a barge similar to Barge 4414 to begin to list after she received damage such as you observed?

A. Approximately a half hour,—

Q. Would it make any difference if the "U" bolt — [95]

A. (Continuing) —to an hour.

The Court: Read that.

(The answer was read by the reporter as follows:)

"Approximately a half hour to an hour."

Q. By Mr. Toner: Half hour to an hour?

A. Yes.

Q. Would it make any difference if the "U" bolt remained in the hole?

A. Yes. the hole would be partially plugged.

Q. Assume that Barge 4414 was loaded with 879 tons of rock, and so trim that she had 2 to 3 feet of freeboard at the bow and 6 to 8 inches of freeboard at the stern,

(Testimony of Fritz A. Scheibe)

do you have an opinion as to whether such a barge would be seaworthy for towing across Catalina Channel?

A. Yes, she would be seaworthy.

Q. Would such a barge be seaworthy for mooring to these mooring floats? A. Yes.

Q. Would it affect your answer any if the freeboard figures were changed to 3 feet at the bow and 18 inches at the stern? A. No.

Q. From your examination of the damage to the bottom of Barge 4414 would it have been possible for that barge to have made the trip from Catalina Island with such damage [96] existent at the time she left Catalina Island?

A. It is my opinion that she couldn't have made that trip.

Q. How long does it take a barge to be towed from the harbor entrance to the mooring float at the mole job?

Mr. Scully: Just a moment, may it please your Honor. I must object to that question on the ground of indefiniteness. You could have a very fast tug, you could have a very slow tug; you could have a direct route taken or an indirect route taken. The map shows two entrances. We don't know which route was taken according to Mr. Toner's assumption in his question.

The Court: The objection is sustained.

Mr. Toner: I believe that is all.

Cross-Examination

By Mr. Scully:

Q. Mr. Scheibe, you expressed the opinion that it would not be possible for Barge 4414 as Mr. Toner described it to you to get on top of the mooring float; is that a correct statement of the opinion you expressed?

(Testimony of Fritz A. Scheibe)

A. Under ordinary circumstances?

Q. Yes, under ordinary surge and currents, and the wind being negligible. A. Yes, that is my opinion.

Q. Would it alter your opinion if added to the [97] circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface at some time or another, would that alter your opinion?

Mr. Toner: If the court please, I should like to object to this question in view of the fact that it is interposing an entirely new fact that has not been brought into the picture. I have no serious objection, assuming that counsel is going to establish such fact.

Mr. Scully: It is a fact tendered by the pleadings; and, furthermore, I am merely testing the witness' qualifications as an expert on that opinion. I think it is proper cross-examination, your Honor.

The Court: It is overruled.

Q. By Mr. Scully: Do you understand the question, Mr. Scheibe?

A. Will you repeat the question, please?

The Court: Read it, please, Mr. Goldstein.

(The following question was read by the reporter:)

"Would it alter your opinion if added to the circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface as some time or another, would that alter your opinion?"

The Witness: My opinion was based on normal conditions [98] with the float on the water.

(Testimony of Fritz A. Scheibe)

Q. By Mr. Scully: Yes.

A. Had the anchor chain been too short with that float submerged, then anything could happen.

Q. She could possibly get afoul of that "U" bolt, couldn't she?

A. Definitely that float would be under water.

Q. Did you see that float after the time of this accident, Mr. Scheibe?

A. No, sir, I did not.

Q. You just inspected the hull damage?

A. Yes, sir.

Q. It is reasonable to expect, is it not, Mr. Scheibe, that in making the voyage from Catalina to the place where Barge 4414 was loaded, under the conditions that you have been told she made that trip with 879 tons of rock aboard, that she would inevitably take some water?

A. Every wooden barge has a certain amount of slight leakage.

Q. This was a relatively new barge, wasn't it?

A. The barge was built either in 1943 or 1944. 1944, I believe.

Q. You as a marine man, as a surveyor, and knowing the age of ships and so forth, would consider her a relatively new craft, wouldn't you? [99]

A. Yes, sir, I would.

Q. And it is true, is it not, that new craft are not always tight at the seams?

A. There were three barges, 4414, —15, —and —16, that were all built at the same time, and they were tight. I went inside of them for a period of six months after they were launched, and they were tight.

Q. I am not claiming this was a leaky barge, or anything of the sort, or that it was in a leaking condition. I am asking you this question as an expert, Mr. Scheibe,

(Testimony of Fritz A. Scheibe)

and I want to know whether it is or isn't true that a relatively new craft of the age that you observed 4414 to be can possibly be somewhat loose at the seams, much more so than one that has been in the sea for some time.

A. No.

Q. They are always as tight as the older craft, are they?

A. The older craft leak a good deal more than the newer craft.

Q. If there is green material in a new craft, does that have anything to do with the tightness of the seams?

A. Depending on the condition of the material when it was put in the barge and when the barge was built.

Q. If it was in improper condition you might have some loose seams? [100]

A. Yes. I happen to know this barge when it was built, and it was fairly well seasoned before it was launched.

Q. I am sure it was. The taking of water on the voyage that I referred to as being possible, I didn't mean through the seams, Mr. Scheibe. It is not unusual at all for a rock barge making that voyage at that time of year to take some water over the gunwale, is it?

A. That is right.

Q. Over the side?

A. That is right.

Q. So that it is entirely probable that this craft arrived at her destination, the mooring block, carrying some free water in her hold?

A. Very probable.

Q. It is not only likely, but you say probable?

A. Yes, some.

Q. And it is true, also, is it not, that the surge of the sea on a craft dead in the water—I mean by dead in

(Testimony of Fritz A. Scheibe)

the water, as you clearly understand, without making any headway—a craft dead in the water, under the ordinary conditions of tide and current and wind negligible at the time that we are talking about there at the Los Angeles Harbor, with some free water in her hold, would be more affected by the surging process and the shifting of the water back and forth as free water, than if she were under way, [101] is that not true?

A. That would depend on circumstances. Under way she might be in a worse sea than the surge would be.

Q. In a worse sea, yes.

A. There would be more sea, and the free water would move around more and have a tendency to go to one side quicker than in a surge.

Q. Let us suppose that Barge 4414 was being towed in the outer harbor where we didn't have any sea to speak of, nothing as mariners know sea, she was making some way, would she not be less affected by free water in her hold than if she were dead in the water under those conditions of surge?

A. That would depend on the amount of free water in her. A couple of inches of free water over the entire bottom of the barge wouldn't make much difference.

Q. I am having difficulty making myself clear, because I am a landlubber, Mr. Scheibe. I am trying to get at this: Won't the free water in the hold swish back and forth more?

A. In the surge?

Q. If she is dead in the water, in the surge?

A. No.

Q. It will shift just as much if she is under way, or if she is dead in the water, making no difference at all, is that right?

A. It will move more when she is under way. [102]

(Testimony of Fritz A. Scheibe)

Q. In which direction?

A. Depending on the angle that the barge is being moved through the sea.

Q. Depending on the surge too?

A. The sea and the surge, yes.

Mr. Scully: That is all.

Redirect Examination

By Mr. Toner:

Q. Mr. Scheibe, counsel—

The Court: Before you ask any question, both Mr. Scully and Mr. Scheibe used the word "surge," depending on the surge. I think I have an idea what the surge is, but will you explain just what you have in mind, Mr. Scheibe?

The Witness: Surge, so-called, in Los Angeles Harbor, the official name for it is seiche, it is a condition that originates out in the ocean, far out in the ocean, just where or how they don't know, but it is a continuous movement of the water. The volume of water comes in like a swell, not a complete wave, but a swell, and comes in, and they come in regular succession, and when the weather is bad out at sea the surges will become larger. As the weather moderates, and sometimes two or three days after a storm, then the surge begins to subside.

The Court: But there is always this surge?

The Witness: A certain motion in that water, yes. [103]

The Court: And that originates out in the ocean?

The Witness: Yes, sir.

The Court: That is what I thought was meant.

The Witness: It is different from a wave.

The Court: Is that sometimes called a ground swell?

(Testimony of Fritz A. Scheibe)

The Witness: Yes, sir, that is a ground swell. However, a ground swell can also originate from high seas further out at sea.

The Court: Go ahead.

Q. By Mr. Toner: How much effect would that have on Barge 4414 loaded as she was with 879 tons of rock?

A. The surge?

Q. Yes.

A. It would have a tendency to make the barge move back and forth with the surge.

Q. How much?

A. Depending on the size of the surge.

Q. Let's assume a normal surge.

A. Anywhere from 5 to 10 feet.

Q. Is that the lateral distance? A. Horizontal.

Q. Horizontal distance? A. Yes.

Q. Would the surge have a tendency to make the barge move up and down? [104] A. Yes, it would.

Q. How much?

A. With a loaded barge it wouldn't be very much; it would be some.

Q. In feet or inches?

A. A few inches with the barge loaded.

Q. This lateral or horizontal motion of 5 feet or so, is that alternately or reciprocating back and forth?

A. I would like to explain it this way: A vessel laying in the surge would move with the surge, and as the surge passes the vessel the vessel has a tendency to go back to original position. Eventually, however, it will move some with the surge, some small distance each time. If the barge was loose or a ship or anything, it would eventually drift away from that position with the surge alone.

(Testimony of Fritz A. Scheibe)

Q. What is the effect of a surge on a properly moored barge?

A. It would have a tendency to make it move back with the surge until it came up on the line, and then it would drop back and the mooring line would become slack.

The Court: Mr. Scheibe, the surge, if I understand your answers, would cause the vessel heavily laden as this one was to move a few inches upward and downward.

The Witness: Yes, sir.

The Court: Would it have any other movement? [105]

The Witness: It would move with the surge.

The Court: If the surge were forward from the bow, that is, the direction of the surge was from the bow toward the stern, would there be any lateral movement?

The Witness: Yes, sir, with the direction of the surge. If the barge is moored so that the bow is toward the surge, the barge would move back with the surge, and then as the surge passed it would come forward again.

The Court: But its upward and downward movement would only be a few inches?

The Witness: That is right.

Q. By Mr. Toner: Would the surge have a tendency to stretch the barge out to the length of the mooring pendant? A. Yes, it would.

Q. So that the mooring pendant would be extending out from the mooring block—is that what you mean?

A. That is right.

Q. And would the surge have a tendency to extend the mooring block away from its anchor?

A. Depending on the weight of the chain or wire that was used from the mooring block or the anchor, it

(Testimony of Fritz A. Scheibe)

would stretch it out some, but the weight of the anchor or the chain or the wire would affect that, the amount.

Q. What is the proper length of mooring wire from the mooring blocks, such as has been described, to the anchor? [106]

The Court: Is this a matter of redirect examination?

Mr. Toner: Possibly not, if the court please.

Mr. Scully: I have a further objection to it, your Honor. It is not within the issues on trial.

Mr. Toner: I don't think it is particularly material at that, if the court please. I have one question.

The Court: If it is an important question, whether it is properly redirect or not, I think you should be allowed to ask it. But it didn't occur to the court that it was a matter that was redirect examination.

What did you have in mind, Mr. Toner?

Mr. Toner: I had in mind the issue that respondent had presented. that the mooring float was, possibly, not seaworthy, or not a proper mooring float, and I wanted to go into the question of whether or not a 75-foot anchor line was a proper line.

The Court: I think that would be a matter of rebuttal testimony. Will Mr. Scheibe be available for that purpose?

Mr. Toner: He says that he has three vessels that are in trouble down in the harbor and he wants to leave as soon as he can.

The Court: You might ask him, then.

Q. By Mr. Toner: Mr. Scheibe, is it proper to have a mooring cable 75 feet long on a mooring float such as we have been discussing? [107]

A. A mooring cable from the float to the barge?

(Testimony of Fritz A. Scheibe)

Q. From the float to the anchor.

A. It depends upon the depth of the water, the length of the mooring cable.

Q. How deep is the water there?

A. I don't know, except by—

Q. At the point indicated by Mr. Jackson.

A. Except by reference to a chart.

The Court: He stated it was 28 feet.

Mr. Toner: Very well.

Q. By Mr. Toner: Assume that the depth of the water was 28 feet, Mr. Scheibe—

The Court: Did he say at low tide?

Mr. Toner: Yes.

Mr. Scully: He said that was his best guess. He never measured it.

Q. By Mr. Toner: Assume that the depth of the water was 28 feet at low tide, would you say that a 75-foot anchor cable was proper?

A. I would say it was sufficient.

The Court: What about the cable from the top of the float? Is there any customary length for that, Mr. Scheibe, or not?

The Witness: Different people use—

The Court: They vary? [108]

The Witness: They vary according to conditions they are working under.

The Court: It should be long enough at least to make it safe to use it?

The Witness: To handle it, yes, sir.

The Court: Then outside of that it is more a matter of the strength of the cable and the opinion of the man in charge, is that correct?

(Testimony of Fritz A. Scheibe)

The Witness: Yes, sir.

Q. By Mr. Toner: Mr. Scheibe, you testified that there was some water that will be taken by a barge of this nature through the seams. How much would you say that Barge 4414 would normally be expected to take on a channel crossing? A. I can't say.

Q. Would it be much or little?

A. It would be a very small amount.

The Court: That is through the seams?

Mr. Toner: Yes.

The Court: It would be a very small amount through the seams.

Q. By Mr. Toner: Assume that the wind was negligible and that the—

The Court: What about the other method, through the gunwales I believe he said? [109]

The Witness: Over the deck. It would be the same problem there. If there were any seams that were leaking slightly there might be some leakage through there.

The Court: I thought you asked another question.

Mr. Scully: You don't have water coming through the seams when you have it coming in over the top?

The Witness: If there are any slack seams there would be a certain amount of leakage.

The Court: Would there have to be leaky seams before there could be any water coming in there, or would some come over the top, as Mr. Scully asked about?

The Witness: If I may explain it this way: Every wooden vessel works to some extent. This one had approximately 900 tons of rock on it, therefore there were certain stresses set up in the structure of the barge which would cause it to work, and the seams are the only place

(Testimony of Fritz A. Scheibe)

that there are openings. These are caulked with oakum. By the working of the barge this oakum would become loose and water will seep through the seams.

The Court: Would any water in the course of coming across from Catalina come over the deck of the barge?

The Witness: Yes, sir, depending on the weather conditions, the amount of water, there will always be some spray and some water coming over the deck of the barge.

Q. By Mr. Toner: Assuming that the wind was negligible [110] and the trip was without incident, would you say that sufficient water would have come in through the seams and over the sides to make any difference in the trim of the vessel, any substantial difference in the trim of the vessel? A. No.

The Court: Mr. Toner, you say through the seams and over the sides.

Mr. Toner: The accumulation of water.

The Court: According to Mr. Scheibe, if I understand him correctly, the water could only come into the hold of the vessel through the leaky seams.

The Witness: There are seams on the top, on the sides, and on the bottom.

The Court: No matter how it came over the top, at the sides, or at the bottom, it could only get in there through leaky seams, is that correct?

The Witness: That is right.

The Court: That makes it clear.

I thought from Mr. Scully's question there might have been some other way of getting in there, and then you said through the seams and over the sides. I thought you had in mind some other way.

(Testimony of Fritz A. Scheibe)

Mr. Toner: Frankly, I thought Captain Scheibe indicated that some water would splash over onto the rock and get into the bottom. [111]

The Court: It could, but even then it would have to go over the sides to go through the seams.

The Witness: Yes. There are hatches in these barges, but they should be closed and sealed before they leave Catalina.

The Court: Then they would have the same function in keeping out the water as the—

The Witness: Caulking of the seams.

The Court: Caulking of the seams would?

The Witness: Yes.

Mr. Toner: That is all.

Recross Examination

By Mr. Scully:

Q. Mr. Scheibe, on counsel's redirect you replied that with the surge the craft might be pulled back away from the mooring float, and the mooring line become taut. When the surge reversed itself you would get scope in the rack or get slack there, and it would come towards the mooring float, wouldn't it? A. Yes.

Q. So that the surge action upon the barge would not assure us that at all times the barge would be off and away from the mooring float while at anchor? There might be times when she would be up against this mooring float, depending on the surge of the sea, isn't that correct? [112]

A. The surge, the wind and the weight of the mooring wire?

Q. Yes, the whole combination of things.

A. That is right.

(Testimony of Fritz A. Scheibe)

Q. The extent to which the mooring float might come in contact with the barge hull, and the point at which she might come in contact with the barge hull, could be affected by the amount of freeboard at the bow, could it not? A. When the barge is loaded?

Q. Yes.

A. It would come in contact with the bow.

Q. And the point on the bow at which she would come in contact, the point on the rake at which she would come in contact would be dependent upon the amount of freeboard on the barge, isn't that true?

A. That is right.

Mr. Scully: That is all.

The Court: But if there is only 3 feet of freeboard on the bow. the float if not submerged would not strike below that 3 feet on the rake, would it, Mr. Scheibe?

The Witness: No, sir, it wouldn't.

Mr. Toner: Pardon me, if the court please. I think the court is mistaken. Three feet of freeboard is what is out of water, and there is 9 feet below water.

The Court: That is what I had in mind. If it is 3 feet [113] above the water, and the float is not submerged, then it couldn't strike the bottom of the barge. That is what I had in mind.

Q. By Mr. Scully: But if the anchor chain was too short it could strike the bottom of the barge, couldn't it, because the float would be held down below the surface of the water on a short chain?

The Court: I think he answered that. I think that is a matter of—

Mr. Scully: Our proof, I think.

(Testimony of Fritz A. Scheibe)

The Court: It may be, but it seems to me it would not require an expert. If the float is submerged, it would be a submerged factor there, or element, and if the boat comes over it, it would depend on how much it was submerged as to where it would strike. It might be submerged so much that it would clear under the bottom.

Mr. Scully: It would be one of those self-evident facts.

The Court: I have a great deal of difficulty in expressing what I have in mind in regard to trying to use these terms, because I do not have enough of these cases to be very familiar with them.

Q. By Mr. Scully: Did you ever see this float, Mr. Scheibe?

A. I probably did, but I couldn't identify it positively. [114]

Q. You have no independent recollection of it?

A. Not this particular float I wouldn't have an independent recollection of it.

Q. What would moss all over a mooring float mean to you?

A. That it had been in the water a long time.

Q. Submerged? A. Not necessarily.

Q. Does sea moss accumulate on portions of things that are not submerged at one time or another, that are always free of the water surface?

A. Not when they are always dry.

Mr. Scully: Thank you.

The Court: You are excused, Mr. Scheibe.

Mr. Toner: May I address counsel, through the court, and ask if Mr. Scheibe can now leave?

Mr. Scully: As far as I am concerned he may.

Mr. Toner: I can get him back to his business, then.

The Court: Have you any further witnesses?

Mr. Toner: Libelant rests.

The Court: The court will take a recess at this time.

How many witnesses have you?

Mr. Scully: I have three, your Honor. I have the master, the man who did the mooring, and one of the assistants aboard the tug. [115]

The Court: How long will your next witness take?

Mr. Scully: I suspect about half hour on direct, your Honor.

The Court: The court will take a recess of a few minutes at this time.

(A recess was taken.)

E. A. REEVES,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scully:

Q. Will you state your name, occupation, and residence?

A. E. A. Reeves, 1515 East Artesia Street, Long Beach, operator of a towboat, have been for several years.

Q. Just keep your voice up.

Mr. Toner: For several what?

The Witness: Several years.

Q. By Mr. Scully: For how long have you been the operator of a tow boat, Captain?

A. I believe in '38, the last part of '38.

(Testimony of E. A. Reeves)

Q. What licenses do you hold with reference to Los Angeles Harbor?

A. I have an unlimited pilot's license for any tonnage.

Q. On March 31, 1945, were you the master of the tug Rocona? [116]

A. Yes, sir.

Q. And who else was aboard with you?

A. Tom Gentle, deckhand; Rudy Tomasic, deckhand; and the engineer was down below.

Q. What is his name? A. Budreaux.

Q. Budreaux? A. Yes.

Q. Prior to March 31, 1945, had you had occasion to navigate Los Angeles Harbor in the operation of the tug Rocona?

A. Yes, sir.

Q. For about how long?

A. Well, I was on the Rocona around seven months. I had been on all of their tugs.

Q. In and about Los Angeles Harbor?

A. Yes, always.

Q. Had you towed barges similar to Barge 4414?

A. Yes, sir.

Q. And loaded with rock? A. Yes, sir.

Q. Had you moored those barges? A. Yes, sir.

Q. On March 31, 1945, did you have occasion to take on a towing engagement of Barge 4414? [117]

A. Yes, sir.

Q. Where and about what time of that day?

A. As near as I recollect I left Catalina around 1:30 P. M., I cleared the east entrance coming into Long Beach Harbor around 11:30 P. M.

Q. How many tows did you have, how many barges did you have in tow at this time?

A. I had two barges, sir.

(Testimony of E. A. Reeves)

Q. What was their cargo? A. Rock.

Q. Will you describe the trim of the Barge 4414 as you left Catalina Island?

A. Yes, sir. She was loaded rather light in the bow and I imagine she had between $2\frac{1}{2}$, 3, or $3\frac{1}{2}$ of free-board in the bow, and anywhere from 10 to 20 inches in the stern.

Q. You mean by those measurements that is the amount of the craft that was above the water's edge, is that right? A. Yes, sir.

Q. Was the other barge loaded about the same?

A. I don't remember exactly, but we commented on this 4414 by her being loaded light in the bow. They usually load them down heavier than that.

Q. Was that an abnormal loading condition?

A. It was out of the ordinary, because they did want [118] the rock over there as quick as they could get it. It was during the war.

Q. Who loaded the Barge 4414 with the rock?

A. A quarry on the east end of Catalina Island.

Q. Under charge of Atkinson, the people here?

A. Yes, sir, I believe so.

The Court: The tug had nothing to do with the loading?

Mr. Scully: No.

Q. By Mr. Scully: You had nothing to do with the loading, did you? A. No.

Mr. Toner: That is conceded.

Q. By Mr. Scully: You had no difficulties or unusual incidents on the voyage over? A. No, sir.

(Testimony of E. A. Reeves)

Q. Will you describe what you did and what you saw as you entered the harbor with those two barges in tow on the 31st of March, 1945?

A. As I came through the east gate, after I came through—

Q. Just a moment, Captain. If you wish you may refer to this chart. Do you recognize the chart?

A. Yes, sir. After I came through the east entrance en route from the mole, the tug *Dispatch*, I believe it was, came out and took one barge from me and left me with the [119] 4414. I shortened my wire, my tow wire, and proceeded up to the most westernmost mooring block, and I believe it was the only one that was empty. I am not sure of that. And I came up to the mooring and made the usual landing, nothing out of the ordinary. To me everything was all right.

Q. Now, just a moment, Captain. After you turned over the other barge to the tug *Dispatch* No. 2, to what extent did you shorten your line on 4414?

A. I imagine I had out between 30 and 40 feet of wire, enough to clear the bridles.

Q. Enough to clear the bridles?

A. Yes, sir, so the bridles wouldn't drag on the stern of the boat.

The Court: When you speak of the bridles, what do you mean?

The Witness: The two towing pendants that connect the bridle.

Mr. Scully: One of libelant's witnesses testified to the triangular condition of two pendants to a ring.

(Testimony of E. A. Reeves)

Q. By Mr. Scully: The line is from that ring to the tug, is that correct, Captain?

A. Yes, it is a shackle.

Q. At the time you made the transfer of the other barge to tug Dispatch No. 2, do you know to what extent, if any, Barge 4414 lost headway? [120]

A. Always within a thousand feet from a mooring block you slow down to a dead slow, and we did that, and come up to the mooring block very slowly.

Q. I am speaking of at the time that you cast off the other barge and delivered her to Tug Dispatch No. 2, did either or both barges lose their headway at that point?

A. Yes, sir, you have to come to a dead stop before you can throw the pendants off the after barge.

Q. If you know, were they both dead in the water at that time?

A. They were almost dead in the water, or the men couldn't get enough slack to throw the pendants off.

Q. How far did that operation of turning over the other barge and shortening your line on the 4414, how far away did that occur from the mooring float to which you secured 4414 later?

A. I don't remember just exactly. I couldn't say just how far off it was. But it was after I came up on the approach to the mole. I don't recall just where they did take it.

Q. Did someone board the barge at any time before you completed your mooring?

A. No one other than the man I put aboard.

Q. Who was that? A. Rudy Tomasic. [121]

Q. When did you put him aboard Barge 4414?

A. Long before I came to the mooring.

(Testimony of E. A. Reeves)

Q. Was it before, at the time of, or after you turned the second barge over to the Dispatch No. 2?

A. It was after I turned the other barge over to the Dispatch No. 2.

Q. Will you describe the process by which you put him aboard, insofar as the maneuvering of the Rocona?

A. I slowed down and pulled the tug over to the starboard side and backed down and let the stern of the tug come very easy to the barge and he stepped aboard with a pipe pole in his hand.

Q. Do you have a recollection as to how far that was away from the mooring float when you did that?

A. I think it was around a thousand feet.

Q. Was this mooring float designated to you as one of the mooring floats to which you should secure this Barge 4414?

A. They had three floats out there, and we could tie it to any of them that were empty.

Q. They were all Atkinson floats? A. Yes, sir.

Q. When you took your tow at Catalina what were your instructions as to the delivery of those barges, where and to whom? [122]

A. Tow them into the Long Beach mole and secure them to the moorings off the mole at the Atkinson job.

Q. Who gave you those instructions?

A. They were orders at all times. Those orders stayed in effect. We didn't get them each time we made a trip. We had those orders all the time.

Q. From whom was that? From the Atkinson Company?

A. We got our orders from Case Construction Company.

(Testimony of E. A. Reeves)

Q. Did you see this float as you approached it?

A. Yes, sir, I put the spotlight on it.

Q. Was that a hand spotlight or one aboard the ship?

A. One aboard the tug.

Q. Do you happen to know its power?

A. No, sir, I don't. It is a fairly good light.

Q. What did you do then when you picked it out after you had Tomasic aboard the barge?

A. I came up towards it very slow, slow as the engine would run without stopping, and I shut the power off before I even come to the mooring with the tug; had slack in my line between the tug and the barge, and I would say 100 feet from the mooring block I kicked the stern of the tug off the port side of the barge and backed down and laid alongside of the barge, but taking no strain on it, in a position to back down and check the headway of the barge if she had headway, and let the barge drift up to the mooring. [123]

Mr. Scully: Does your Honor understand the witness' testimony? That is, what his maneuvers were? He used a bit of seaman's language.

The Court: Yes, I think so. I believe it is clear.

According to his statement he came up there slowly in order to make this mooring. That is the substance of it, I think.

Mr. Scully: Then he said he backed down.

Q. By Mr. Scully: Did you say you laid alongside of the barge?

A. Lay alongside off the barge, but with my wire slack but taut enough in case I had to back down against it all I had to do was to ring two bells and have one man

(Testimony of E. A. Reeves)

standing by the winch, brake on the winch so when the tug came against it he could slack just a little and it wouldn't jerk against the wire, and would come against it easy.

The Court: I understand it.

Q. By Mr. Scully: Did you see the fastening of the mooring pendant from the float to the Barge 4414?

The Court: Read that question, please.

(The question was read.)

A. I could see Tomasic, Rudy Tomasic, pull in at it with a pipe pole, and the pendant was down, hanging down in the water, and it takes quite a little pulling to get it up, and a little time, and I could see him working with it. And [124] he laid the pipe pole down after he got it to him with the pipe pole, and then pulled it in by hand and laid it over the bit on the barge.

Q. At that time was the barge making any headway at all?

A. No, sir.

Q. Was she dead in the water?

A. Yes, sir.

Q. Then what happened? What did you do or what did Tomasic do?

A. I believe I hollered and said, "Is everything O. K.? Is she O. K.?" And he said, "Yes, she is O. K." And I kicked up alongside and he threw my wire off, my tow wire, and came aboard with a pipe pole. I played my spotlight on the length of the barge and we left and went into berth 94, I believe it was.

Q. When you played your spotlight on the length of the barge did you observe anything abnormal or unusual?

A. No, sir, she looked just like she did when we left the island.

(Testimony of E. A. Reeves)

Q. Did you see the float at that time?

A. I don't remember if I did or not. It was such an ordinary, common thing that we did all the time that nothing was out of the ordinary, and it was being done so much, when everything was all right you wouldn't—you [125] wouldn't be inspecting the barge if you figured everything was all right.

Q. After you saw Tomasic drop the pendant over the bit on the barge did you at any time thereafter tighten your line between the barge and the tug? A. No, sir.

Q. Are you positive of that?

A. I am pretty positive of it. I don't believe I even backed down against the barge, because she had no headway, she was at a dead stop, other than the surge back and forth.

Q. Captain, do you know whether or not you pulled that barge over the mooring float?

A. I don't think I did.

Q. Would you know if you did?

A. Yes, sir, I suppose I would.

Q. Did you? A. No.

Q. Did you make an entry in the log—

A. No, sir.

Q. Just a moment. Did you make an entry in the log for that night of the mooring of the Barge 4414, did you enter the fact that you had moored her?

A. Yes, sir, I always enter that, the time of the mooring. [126]

Q. Does your log show any reference, if you know, to any abnormal occurrence there at that time, other than the fact of mooring? A. I don't believe they do.

The Court: Where is the log?

(Testimony of E. A. Reeves)

Q. By Mr. Scully: Do you have the log?

A. No, sir. The company keeps the record of the log.

Mr. Scully: We will try and get that, your Honor.

The Court: I think if you are going to use that, that would be the best evidence.

Mr. Scully: It probably would.

The Court: He merely says he didn't think he did.

Q. By Mr. Scully: What did you do after you left there? You went to berth what? A. 94.

Q. What did you do there?

A. We secured the boat and our relief was there, and we went home.

Q. Did you see the mooring float that night?

A. Yes, sir.

Q. Will you describe its appearance?

A. Well, it had moss, green moss on it, and it looked as if it was floating level with the water, and it had a "U" bolt 2 inches in diameter and up about 10 or 12 inches in a "U" shape. [127]

Q. You said level with the water; did you see any freeboard on the float itself? Was any portion of the float above and riding clear of the surface of the water?

A. I think she was just about level with the water.

Q. What would that indicate to you as a result of your experience and knowledge of such things in Los Angeles Harbor?

A. She must have been waterlogged, and a very old mooring, and a short scope of chain on it. She must have been up and down on her chain, almost. Either one could cause it.

Q. You said short scope of chain. Just what do you mean in landlubber's language on that?

(Testimony of E. A. Reeves)

The Court: I think I know. That the chain wouldn't be long enough to give much play to the float, is that correct?

The Witness: Yes.

The Court: If it is a short chain and there was a considerable depth of water there she would be almost straight up and down?

The Witness: Yes, sir.

Q. By Mr. Scully: About how long did it take you to moor this Barge 4414 that evening?

A. I couldn't say exactly, but it must have been between 5 and 10 minutes.

Q. About what time do you think you left the mooring [128] float having secured Barge 4414 thereto?

A. I believe my log says about 12.

Q. Midnight?

A. It is exact in the log, yes, sir.

Q. Did you see the Barge 4414 after that evening?

A. I didn't see it when it was turned over. I have towed the barge since then and on the same job.

Q. Did you observe the length of the mooring pendant which was attached to the top of the float that evening?

A. No, sir, I couldn't say how long it was. I observed the pendant, but I couldn't say how long it was.

Q. Do you know what the approximate depth of the water is at the place where that float was anchored?

A. I would say it is between 18 and 25 feet, minus tide.

Q. You mean a low tide? A. Yes, sir.

Q. Have you ever in your experience at sea and in these harbors had occasion to observe damage to the bottom of a barge of a similar type to 4414 caused by mooring floats?

(Testimony of E. A. Reeves)

Mr. Toner: If the court please, I should like to object to this witness testifying to that type of question, inasmuch as he is a definite marine man engaged in the towing business and not engaged in the repairs, nor is he qualified to speak concerning repairs of damage to barges. [129]

The Court: This is a foundational question, so the objection is overruled.

The Witness: Could I have the question again, please? (The question was read by the reporter.)

The Witness: No, sir.

Q. By Mr. Scully: Have you ever seen barges of this type loaded similarly to the way the barge was that night come in contact with mooring floats? A. Yes, sir.

Q. Under what circumstances?

A. I have seen them overrun the mooring floats, and I have seen them come up against them with pretty good headway on, and I have even pulled one of them off that another tug run over the mooring with, I pulled the barge off, and no damage whatsoever to the barge.

Q. In the other instances that you saw overrunning occur, as distinct from this last one that you helped pull off, was there damage to the hull of the barge?

A. No, sir.

Mr. Scully: You may cross-examine.

The Court: Do you think this will be very extended?

Mr. Toner: No, it will not.

Cross-Examination

By Mr. Toner:

Q. Mr. Reeves, when you picked up the Barge 4414, did [130] you consider her seaworthy to make the trip across the channel? A. Yes, sir.

(Testimony of E. A. Reeves)

Q. You have a duty to the barge not to pick her up unless she is seaworthy, do you not?

A. That is correct.

Q. You had no trouble coming over?

A. No, sir.

Q. How long is the bridle upon which you pulled her?

A. I believe around 50; they run anywhere from 35 to 60 foot pendants.

Q. What was this one, if you know?

A. I don't know for sure. I wouldn't say for sure.

The Court: Mr. Toner, I want to ask a question just there.

When you speak of the bridle, would that mean the entire length from one bit to the other on the barge, or would that mean just one way?

The Witness: Sir, that would mean from the shackle to the bit, one pendant, the length of one pendant.

The Court: There are two pendants?

The Witness: Two identically the same length, yes, sir.

Q. By Mr. Toner: When you refer to wire you refer to the distance from your tug back to the place where these two pendants join? [131]

A. When I refer to wire I mean all the way to the barge.

Q. So when you said that you shortened to 30 or 40 feet of wire, did you mean 30 or 40 feet of wire in addition to the pendant—to the bridle, or including the bridle?

A. Well, I could mean either one.

Q. What did you mean this time?

A. You usually shorten about 40 feet from the shackle, so when you are maneuvering around your pendants, that the pendants won't get in the wheel of the boat, there will

(Testimony of E. A. Reeves)

be enough wire so they will hang down deep enough and you won't pick them up with the wheel of the tug.

Q. How far away was the tug from the bow of the barge then? A. From 40 to 50 feet.

The Court: Read the answer.

(The answer was read.)

The Witness: I never measured it, but that is—

The Court: About?

The Witness: Yes, about. That is a guess.

Q. By Mr. Toner: Was it a dark night?

A. It was fairly dark.

Q. How big is the tug?

A. It is 65 feet over all, I believe, approximately.

Q. Were you in the pilot-house? [132]

A. Yes, sir.

Q. And the pilot-house is located forward on the tug?

A. Yes, sir.

Q. You say you made your usual landing?

A. Yes, sir, that is right.

Q. At what rate of speed did you pull the barge from the point you transferred the other barge to the Dispatch to the time you shut off power before coming to the mooring float? A. Very slow.

Q. What rate? A. Rate per knot?

Q. How many knots?

A. I would say she wouldn't make over one or three-quarters of a knot.

Q. From one to three-quarters of a knot?

A. That is right.

Q. From the outside of the harbor entrance?

A. No, sir, I didn't say that.

(Testimony of E. A. Reeves)

Q. Where did you transfer—

A. About a thousand foot off of the mooring. Maybe a little more.

Q. Where did you shorten—

The Court: You say one to three-quarters. That is three-quarters of a knot to one knot an hour? [133]

The Witness: Yes, sir.

Q. By Mr. Toner: When you were a thousand feet from the float you transferred the barge to the Dispatch, the second barge? A. I didn't say that.

Q. What happened?

A. I transferred the man at about a thousand.

Q. Then you continued to pull the barge toward the float? A. Yes, sir.

Q. At about the same speed? A. Slowly.

The Court: Pardon me. As I understand it, he had already released the other barge to the tug Dispatch before that time.

Q. By Mr. Toner: Where did you release the other barge to the tug Dispatch?

A. I believe I have already stated that.

The Court: I know, but answer it now.

The Witness: I wouldn't say exactly. It was somewhere en route from the east entrance, it was some place between the east entrance and the mole job, on the approaches of the mole job.

Q. By Mr. Toner: Who took the pendants off the Barge 4414 when you transferred the other barge to the Dispatch? [134]

A. No one took the pendants off of 4414 when I transferred the barge to the Dispatch.

(Testimony of E. A. Reeves)

The Court: It wasn't necessary to?

The Witness: No; he took the other barge.

Q. By Mr. Toner: Someone had to unhook the two barges, didn't they?

A. Yes, but we towed 4414 on to the mooring. They didn't unhook 4414; they unhooked the other barge.

Q. Who took the moorings off the stern of Barge 4414?

A. There were no moorings on the stern of Barge 4414.

Q. There is a bridle that runs from the stern of 4414 to the other barges, isn't there? A. No, sir.

Q. Was Barge 4414 the second barge?

A. It was the last barge.

Q. So that you transferred the first barge to the Dispatch? A. Yes.

Q. And then you went back and picked up 4414?

A. I shortened my wire.

Q. Did you have any trouble seeing the mooring float as you put the spotlight on it coming up to the float?

A. I had no trouble after I put the spotlight on it.

Q. How far away did you see it, or how far away was it when you first saw it? [135]

A. I would say a thousand, 1200 feet.

Q. I believe you said when you were 100 feet from the block you cut your speed; is that correct?

A. I don't think I said that. I slowed down when I put the man aboard, a thousand feet.

Q. When did you cut the power as you were approaching the block?

A. As I was approaching the block?

(Testimony of E. A. Reeves)

Q. Yes.

A. I think I shut the power off at 100 or 150 feet, I am not sure, I shut the power completely off and let her drift.

Q. And let the float drift ahead?

A. Let the barge drift ahead.

The Court: When you refer to the block, that is the same as the float, is that correct, Mr. Toner?

Mr. Toner: Yes. I believe this witness has been referring to the float as the block.

Q. By Mr. Toner: What time were you supposed to quit that night, Mr. Reeves?

A. We always got relieved after we had secured our tow and went into the dock, after making two trips to the island.

Q. Did you have any shift that changed at 12:00 o'clock midnight? [136]

A. They were never regular. They never knew exactly what time we were going to get in. They had to guess approximately what time to call the other crew.

Q. Did you have a radio aboard the tug?

A. We had a radio.

Q. What time did you tell your office you were going to get in?

A. You can tell them approximately.

Q. What time did you tell them?

A. I don't remember.

Q. March 31st was Saturday night, wasn't it?

A. I don't remember that. That has been almost three years.

Q. Do you remember where you went after you got the tug moored?

A. Yes, sir.

(Testimony of E. A. Reeves)

Q. Where? A. Home.

Q. Did you have any trouble seeing Tomasic getting the mooring pendant up from the block?

A. Repeat that.

Q. Did you have any trouble seeing Tomasic get the mooring pendant up from the block?

A. I could see him working on it, I could see that he was having trouble, it took him quite a little while to get [137] it, he was slow getting it up because he had to pull it up out of the water.

Q. Did you anticipate that there was any danger in mooring this barge to this particular mooring float?

A. No, I never had any trouble previous to that.

The Court: Had you moored other barges to the same mooring float?

The Witness: Yes, sir.

Q. By Mr. Toner: I believe you said that you didn't see the mooring float itself after you left the barge?

A. No, I didn't.

Q. You didn't pay any attention to it?

A. No; I put the light on the barge and played it the length of the barge and turned it off and went in.

Q. Which mooring bit was used for mooring the barge? A. It was on the starboard one.

Q. Starboard forward? A. Yes.

Q. Were you in sole control of the tow and the mooring? Did you take orders from anybody as to the tow or the mooring?

A. No, sir; I was responsible for the tow until it was delivered to the mooring and secured properly.

Q. And you took your orders from Case Construction Company? [138]

A. From the dispatcher over there.

(Testimony of E. A. Reeves)

Q. Do you know whether the barge took any water on the trip over?

A. No, sir, I didn't gauge it. They all usually take some water.

Q. How much?

A. It is hard to say. You would have to know the condition of the barge to gauge it.

Q. Did you have any trouble with the barge?

A. No, sir.

Q. You didn't run her on the mole, did you?

A. No, sir.

Q. You didn't run her on the breakwater?

A. No, sir.

Q. As far as you know the barge was in good shape at Catalina, is that right?

A. Yes, sir, as far as I knew.

Q. Could she have come across the channel with a hole in her?

A. Sure she could come across the channel with a hole in her.

Q. Right side up? A. Yes, sir.

Q. With a hole 2 inches by 6 inches?

A. No, not with a hole 2 inches by 6 inches in her. [139]

Q. What would happen to the barge with a hole that size in it? A. 2 inches by 6 inches?

Q. Yes.

A. The chances are she would sink or dump her load and float full of water.

Mr. Toner: I believe that is all.

(Testimony of E. A. Reeves)

Redirect Examination

By Mr. Scully:

Q. Captain, when does your responsibility for the engagement which you undertook that day to tow that barge to Los Angeles Harbor cease? When were you through with your contract or your job in that respect?

A. After the pendant was on the bit and the barge was secured properly.

Q. And in your opinion, based upon your experience and upon what you did that night, was it properly done on that occasion?

A. Yes, sir, it was.

Q. According to the rules, judgment and degree of care exercised by seamen and pilots in Los Angeles Harbor operating towboats?

A. Yes, sir.

Q. You occupied what position on the Rocona? Where were you standing on the Rocona as you watched Tomasic fishing [140] for the pendant at the float?

A. I had my head out the starboard window in the pilot-house where I could see him and the barge.

Q. Was your vision at all obstructed except by the darkness at that time?

A. That is all.

Q. How far away were you from him at that time in a straight line of vision?

A. The width of the barge and about 15 or 20 feet besides that.

Q. What do you estimate that to be in total feet?

A. Well, I imagine around 60 feet.

Q. Did you have any difficulty seeing him? Could you make out what he was doing?

A. I could see him fighting to get the pendant up, and it seemed that he was having quite a bit of difficulty taking it aboard. It took him quite a little while.

(Testimony of E. A. Reeves)

Q. Were you at the controls at that same time? Were they within your reach?

A. Yes, I had the bell cord in my hand.

Q. Was that the way you controlled your craft?

A. Yes, all I had to do was ring two bells, I could have backed the barge clean away from the mooring float.

Mr. Scully: That is all, your Honor.

The Court: You are excused, Captain. [141]

I think the court will take an adjournment at this time until 10:00 o'clock tomorrow morning.

The witnesses are ordered to return at that time, those that have not testified.

I understand the Captain has some important business, and you have no desire that he remain?

Mr. Toner: I have no desire, no.

Mr. Scully: I would like to excuse him, your Honor.

The Court: He is excused.

(Whereupon, at 4:15 o'clock p. m., Tuesday, December 16, 1947, an adjournment was taken until 10:00 o'clock a. m., Wednesday, December 17, 1947.) [142]

Los Angeles, California, Wednesday, December 17, 1947.
10 A. M.

The Court: Proceed.

Mr. Toner: I should like to move to reopen my case in chief to introduce the chart No. 5147, which I offer as Libellant's Exhibit next in order.

The Clerk: No. 4.

Mr. Scully: My only comment in that respect, may it please your Honor, is as I made the statement at the opening of this case, that the chart is not objectionable to the

respondents and the claimant for use along with the witnesses' testimony who have used it to illustrate what they testified about.

The Court: That was understood at the time of the testimony.

Mr. Toner: Yes, that is the understanding.

The Court: It is received for illustrative purposes only.

Mr. Scully: That is my understanding of it, your Honor.

Mr. Toner: Yes. And it purports to give the physical situation as it now exists. And there is testimony of witness Jackson and marks by witness Jackson on the chart.

The Court: Let it be received and marked as Libelant's Exhibit 4. [144]

(The chart referred to was marked Libelant's Exhibit 4, and was received in evidence.)

Mr. Scully: May it please your Honor, with counsel's agreement I offer—I believe it will be Claimant's B—three log sheets bearing serial numbers 1360, 1361, and 1362, as a composite exhibit, being the log of the ship Rocona for the 31st of March, 1945, and a portion of the 1st of April, 1945, and ask leave to have it copied and the original withdrawn, inasmuch as these are the original sheets.

The Court: You have no objection to them?

Mr. Toner: I have no objection.

The Court: Let it be received with the understanding that copies may be substituted.

May I see them, Mr. Clifton?

(The exhibits were handed to the court.)

Mr. Scully: There may be some abbreviations on there which our next witness can aid the court in interpreting, inasmuch as he has personal knowledge of the log.

I call Mr. Tomasic as a witness.

Mr. Toner: If the court please, may I ask that we be furnished with a copy of the log, also, when the copy is filed?

Mr. Scully: That is satisfactory.

(The log sheets referred to were marked Respondents' Exhibit B, and received in evidence.) [145]

RUDY TOMASIC,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Rudy Tomasic.

Direct Examination

By Mr. Scully:

Q. Will you state your residence and your occupation?

A. 212 West Sixth Street, San Pedro, California, and I am self-employed.

Q. What is your trade or profession?

A. I am a seaman, sir.

Q. And how long have you been such seaman?

A. Since I was 14.

Q. And in and about what waters?

A. Mostly around San Pedro and Southern California waters, and some deep sea time, also.

Q. Have you ever served in connection with tugboat operations and towing operations in and about Los Angeles Harbor?

A. Yes, I have.

(Testimony of Rudy Tomasic)

Q. For how long? A. About four years.

Q. Do you hold any certifications?

A. Now I hold a limited American Master's license and [146] unlimited Panamanian Master's license.

Q. During March, 1945 who were you employed by and what were your duties?

A. I was employed by Case Construction as deckhand on the Tug Rocona.

Q. Who was the master of that tug?

A. Captain Reeves.

Q. I call your attention to the 31st of March, 1945 and ask you if you made a trip from Catalina to Los Angeles Harbor with Atkinson Barge No. 4414 in tow?

A. Yes, I did.

Q. Will you state when you picked the barge up? And where?

A. We picked the barge up at Catalina Island, at the east end quarry, and we delivered her over to the Atkinson job on the mainland side.

Q. Describe the trim of the barge as you took her in tow?

A. The barge was loaded, she was down by the stern and rather light on the bow.

Q. Will you describe the freeboard that you observed at that time fore and aft?

A. I believe it was about one foot on the aft and about three feet forward.

Q. Was there any unusual or abnormal happening [147] during the voyage across the channel?

A. No, sir.

Q. What was the nature of the sea and the water during the crossing? A. It was moderate.

(Testimony of Rudy Tomasic)

Q. Were there any caps, whitecaps?

A. I don't remember that.

Q. Did you observe any spray or waves breaking against the Barge 4414 during the trip?

A. Well, almost on any trip that you are on you have spray and some water goes up on the barge regardless of whether it is calm or rough.

Q. Did that happen on that trip?

A. Yes, it did.

Q. Will you describe what you saw and what you did as you entered the harbor with that barge in tow that evening?

A. Well, we—

Q. And about the time.

A. I believe we entered the harbor about, oh, 11:30 and we checked by the Coast Guard and went through the net and went down to the Atkinson job and we tied up the barge we had left, that was 4414—we had given 4412 to the Dispatch—and after we were through tying it up we went in and were relieved.

Q. I ask you to observe the chart which is a libellant's [148] exhibit in this case, No. 4, and I point out to you the breakwater at the entrance to the harbor; do you recognize that breakwater?

A. Yes, sir.

Q. Is that the approximate situation that existed as you came into the harbor that evening in March, 1945?

A. Well, it doesn't show the Navy net, but the rest of it is approximately the same.

Q. The breakwater is as shown?

A. Yes.

Q. You see two entrances on that chart to the breakwater to the harbor?

A. Yes.

Q. Which entrance did you come through?

A. We came through the east end.

(Testimony of Rudy Tomasic)

Q. I call your attention to the mole which is apparently built, which is in the vicinity of the pencil marks on the chart, F.C.J. 1 and 2, and two X's near that initial; what was the condition of that mole at that time?

A. It was partially finished. I believe they were dumping small rock down at this end (indicating).

Mr. Scully: Witness indicates the easterly end of the partially constructed mole.

Q. By Mr. Scully: About what distance is it, Mr. Tomasic, from this east entrance to the breakwater to that [149] most easterly point of the mole?

A. Oh—

Q. Perhaps you can read the chart.

A. Approximately two miles.

Q. You mentioned turning the other barge, which was along with the 4414, over to Dispatch No. 2; about where did that occur with reference to a point northerly from the eastern entrance to the breakwater?

A. That occurred in through here (indicating), approximately this position (indicating).

The Court: Read the question.

(The question was read.)

Q. By Mr. Scully: Measuring out from this northerly, will you please place a mark, labeling it "T-1" where you turned the other barge over to the Dispatch 2?

(Witness does as requested.)

Q. About how far was that—

The Court: I think this map now and probably before really exceeded the limitation placed on it for illustrative purposes. It is being used for purposes of identifying places. I think it should be received without any limitation.

(Testimony of Rudy Tomasic)

Q. Were there any caps, whitecaps?

A. I don't remember that.

Q. Did you observe any spray or waves breaking against the Barge 4414 during the trip?

A. Well, almost on any trip that you are on you have spray and some water goes up on the barge regardless of whether it is calm or rough.

Q. Did that happen on that trip?

A. Yes, it did.

Q. Will you describe what you saw and what you did as you entered the harbor with that barge in tow that evening?

A. Well, we—

Q. And about the time.

A. I believe we entered the harbor about, oh, 11:30 and we checked by the Coast Guard and went through the net and went down to the Atkinson job and we tied up the barge we had left, that was 4414—we had given 4412 to the Dispatch—and after we were through tying it up we went in and were relieved.

Q. I ask you to observe the chart which is a libellant's [148] exhibit in this case, No. 4, and I point out to you the breakwater at the entrance to the harbor; do you recognize that breakwater?

A. Yes, sir.

Q. Is that the approximate situation that existed as you came into the harbor that evening in March, 1945?

A. Well, it doesn't show the Navy net, but the rest of it is approximately the same.

Q. The breakwater is as shown?

A. Yes.

Q. You see two entrances on that chart to the breakwater to the harbor?

A. Yes.

Q. Which entrance did you come through?

A. We came through the east end.

(Testimony of Rudy Tomasic)

Q. I call your attention to the mole which is apparently built, which is in the vicinity of the pencil marks on the chart, F.C.J. 1 and 2, and two X's near that initial; what was the condition of that mole at that time?

A. It was partially finished. I believe they were dumping small rock down at this end (indicating).

Mr. Scully: Witness indicates the easterly end of the partially constructed mole.

Q. By Mr. Scully: About what distance is it, Mr. Tomasic, from this east entrance to the breakwater to that [149] most easterly point of the mole?

A. Oh—

Q. Perhaps you can read the chart.

A. Approximately two miles.

Q. You mentioned turning the other barge, which was along with the 4414, over to Dispatch No. 2; about where did that occur with reference to a point northerly from the eastern entrance to the breakwater?

A. That occurred in through here (indicating), approximately this position (indicating).

The Court: Read the question.

(The question was read.)

Q. By Mr. Scully: Measuring out from this northerly, will you please place a mark, labeling it "T-1" where you turned the other barge over to the Dispatch 2?

(Witness does as requested.)

Q. About how far was that—

The Court: I think this map now and probably before really exceeded the limitation placed on it for illustrative purposes. It is being used for purposes of identifying places. I think it should be received without any limitation.

(Testimony of Rudy Tomasic)

Mr. Scully: Very well. I will withdraw that objection, your Honor.

Q. By Mr. Scully: You have placed the mark "T-1" on Libelant's Exhibit 4. About how far off the mole workings [150] was that?

A. I would say about 200 yards.

Q. You said Barge 4414 thereafter was moored. Is that what you said?

The Court: Before you answer that question, Mr. Tomasic, I would like to ask a question if I may interrupt.

When you turned the other barge over to the Dispatch, and that was about the point "T-1"—

The Witness: Yes, sir.

The Court: —in which direction did the Dispatch move away?

The Witness: The Dispatch moved off in—it would be a northeasterly direction, I believe.

The Court: It would be northeasterly from T-1?

The Witness: Yes, sir.

The Court: And proceeded toward what is now the mole?

The Witness: Yes, sir.

The Court: But got well out of your way?

The Witness: Yes, sir.

The Court: Very well. Go ahead, Mr. Scully.

Q. By Mr. Scully: What was the condition of the way, if any, being made by Barge 4414 at the time you turned the other barge over to the Dispatch 2?

A. Well, she was moving very slowly.

Q. Could you approximate her speed? [151]

A. Oh, one at the most.

Q. One what? A. One knot.

(Testimony of Rudy Tomasic)

Q. Did you leave the Rocona at any time during this operation? A. Yes, sir.

Q. When and under what conditions?

A. After the Dispatch took the other barge we shortened up the towline, after we had it shortened up Captain Reeves backed down close to the barge and I jumped over with my pipe hole.

Q. Backed the Rocona down towards the barge?

A. Yes, the Rocona.

Q. What part of the Rocona did you leave in going aboard the 4414? A. The stern, sir.

Q. And what part did you first step onto on the barge? A. The bow, sir.

Q. To what extent did Captain Reeves shorten his line on the 4414 at that time?

A. He shortened it down until he had about, oh, 35 or 40 feet of cable off of the stern of the Rocona.

Q. That 35 or 40 feet which you mentioned, does that indicate the measurement from the stern end of the Rocona to the bow end of the barge, or what distance does it indicate? [152]

A. It indicates the distance from the stern of the Rocona to the bow of the barge.

The Court: That included both the cable and the bridle?

The Witness: That's right. But that does not include the wire from the stern to the winch.

Q. By Mr. Scully: Winch on what craft?

A. On the Rocona.

The Court: From the sternmost part of the Rocona to the bow of the barge it was about how far, did you say?

(Testimony of Rudy Tomasic)

The Witness: About 35 feet, sir.

The Court: And that included the bridle from the barge and there was a cable to the bridle, wasn't there, a shackle?

The Witness: If I may explain. You heave the bridle to the part where the shackle joins just over the stern (indicating).

The Court: I see. It was shortened so that the shackle just cleared the stern?

The Witness: Yes, of the Rocona.

The Court: Of the Rocona?

The Witness: Yes.

Q. By Mr. Scully: After you had shortened your line you were now clear of the other barge?

A. Yes, sir, the other barge was well gone by the time we shortened the line.

Q. What did you do and what did Reeves do with refer- [153] ence to the movement of the Rocona?

A. After I went aboard the barge?

Q. Yes, after you had cast off the other barge and you had shortened the line on 4414, what then took place?

A. He proceeded to the most westerly mooring.

Q. In what direction from "T-1"? A. West.

Q. To the mooring, you say? A. Yes, sir.

Q. Will you place "T-2" at the point that you recall was occupied by the mooring?

A. "T-2" would be here (indicating).

Q. About what distance is "T-2" from "T-1"?

A. A half to a quarter of a mile.

Q. Of a mile? A. Yes, of a mile.

Q. How far off the then existing works or land works was "T-2"? A. 1500 feet, I believe.

(Testimony of Rudy Tomasic)

Q. What was the greatest rate of speed attained by the Rocona with the 4414 in tow as she moved from the point "T-1" to the point "T-2"?

A. He proceeded a slow speed, I would say about one knot.

The Court: Mr. Tomasic, you say "T-2" is about 1500 [154] feet from what?

The Witness: From the mole, sir.

The Court: How far out was the mole built at that time?

The Witness: From the actual shore?

The Court: Well, here is the end of it out here (indicating); where does it come out? Can you tell about how far it was built by pointing on this?

The Witness: I believe that the mole was completed up to about this position (indicating).

Mr. Scully: Mark that "T-3," please.

(Witness does as requested.)

The Court: And this point "T-2" would be about 1500 feet away from here (indicating)?

The Witness: Yes, sir.

The Court: Do you know what the scale is on this?

Mr. Scully: A representative fraction of one over 12,000. One on the map equals 12,000 units on the ground.

The Court: Just looking at that, it seems to me that would be closer than 1500 feet.

Mr. Scully: That is what it looks like to me, too.

Of course, Mr. Tomasic is not attempting to make this to scale. But is this two miles from the entrance into—

The Witness: I believe on this chart each one of these represents a—let me see.

(Testimony of Rudy Tomasic)

Mr. Toner: Each of these is a minute. Each of these, [155] if I may interrupt, each of these is a nautical mile, which is about 6,000 feet.

The Court: Then it wouldn't be one-fourth of that distance here. It would be more in here (indicating). He has made it too close, anyway, to the mole, if the mole was built out there and it was 1500 feet.

The float that you moored to was about 1500 feet away from the mole?

The Witness: Yes, sir.

Q. By Mr. Scully: And you said that this point "T-1" and "T-2" are distant each from the other about a quarter of a mile? A. Yes.

Q. Do you refer to a nautical mile? A. Yes.

Q. That is about 1500 feet, then? A. Yes.

The Court: Then if this is correct from "T-1" to "T-2," "T-2" should be more out in here (indicating).

Mr. Scully: Yes.

The Court: We won't change it. We understand it is 1500 feet.

Q. By Mr. Scully: You understood my question what was the greatest rate of speed attained—

The Court: He has answered that. [156]

Mr. Scully: Yes, he answered that as one knot.

Q. By Mr. Scully: You were aboard the Barge 4414 at that time? A. Yes, sir.

Q. Describe the wind, current and surge, if you observed them, at that time.

A. Well, there was moderate conditions. There was nothing abnormal about the weather.

Q. Do you include surge in the weather?

A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. Was there a surge?

A. There is always a surge in there, sir, regardless.

Q. Was there that night?

The Court: If there is always, that would answer it, wouldn't it?

Mr. Scully: I wanted to make it positive on the point.

Q. By Mr. Scully: Did you see the mooring float as you approached it? A. Yes, sir.

Q. How far away from that float were you when you first made it out?

A. The actual distance I can't say, sir. I first noticed it when Captain Reeves turned the light on it.

Q. Did you observe any other unoccupied mooring floats in that vicinity at that time? [157]

A. No, sir; the other ones had barges on them.

Q. Describe what took place as you approached the mooring float from the time you first discerned it when Captain Reeves played the light on it.

A. When we got a short distance away—

Q. About how far?

A. Oh. I would say about 200 feet, Captain Reeves stopped the boat, stopped the engine, the boat naturally worked ahead slowly.

Q. The Rocona?

A. Yes. The only way the barge and boat had after that was drifting ahead of the way that she already had.

Q. By that you mean motion forward?

A. Yes, motion forward. By the time we got up to the approximate position of the mooring the boat and the barge were practically dead in the water, stopped.

Q. Did the barge approach the mooring during that 200 feet dead on or at an oblique?

A. It approached her from the starboard corner.

(Testimony of Rudy Tomasic)

Q. So that if she kept on going what would be the relative position of float and barge?

A. The float would have been on the barge's starboard side.

Q. Was the line from the Rocona taut on the barge during this time? [158]

A. No. Captain Reeves had maneuvered the Rocona into a position where if he had to back down he would back down. The reason for this maneuver is sometimes a barge will go by and then you back down on her slowly and put her back in position.

Q. Did this barge on that occasion go by?

A. No, sir.

Q. Describe what happened then as you came up to the barge? You were on the barge, were you?

A. Yes, sir.

Q. Describe the position you occupied on the barge, what you did and what took place then.

A. I was on the starboard corner with my pipe pole, and as we approached the mooring I noticed that the pendant was hanging not on the mooring but straight down into the water. Therefore I reached down as we approached it and got ahold of this with the pipe pole, and then I pulled it up by hand out of the water and put it on the starboard Sampson post.

The Court: What was the composition of that pendant? What sort of material?

The Witness: It was cable, sir.

Q. By Mr. Scully: Rope or wire cable?

A. Wire cable.

(Testimony of Rudy Tomasic)

Q. What was its condition? [159]

A. It looked like it had been down in the water off and on for some time, because it had moss on it and I had a hard time getting it up.

Q. What difficulties did you experience in getting it up and what period of time, approximately, did it take to get it up?

A. It took me from five to ten minutes to get that up, sir.

Q. About how long was it when you finally got it up?

A. I would say between 35 and 40 feet.

Mr. Scully: Does the court desire an explanation of the Sampson post? It is the first time that term has appeared.

The Court: Yes.

Q. By Mr. Scully: Describe a Sampson post.

A. A Sampson post is a post on a barge usually one on each corner where you throw the mooring or a line over it to secure it and make it fast.

The Court: Has that been referred to as the bit?

Mr. Toner: Yes.

Mr. Scully: Yes, sir, it has.

Q. By Mr. Scully: During this time that you were fishing this pendant from below the surface you were on the barge? A. Yes, sir.

Q. And what was the relative position of barge to [160] float at that time?

A. The relative position of the barge to the float was the starboard corner was into the float.

Q. Were the two touching each other?

A. They were not touching, but they were very close.

(Testimony of Rudy Tomasic)

Q. Could you see all of the topside of the float?

A. Yes, sir.

Q. Did you go aboard the float? A. No, sir.

Q. Why?

A. It was covered with moss, and that is dangerous going aboard a float that way.

Q. Describe the type of moss.

A. Well, it was a moss that looked to me as if the float would go under water at high tides. It was the long hairy type moss that is just as slippery as could be.

Q. Was the float wet at that time on top?

A. Well, it wasn't wet, but it was slippery. The moss keeps a certain moisture in it all the time.

Q. Approximately, if you noticed it, how much of the float was above the surface of the water?

A. I would say that all except one of the corners was above the water.

Q. You are talking about the topside now?

A. Topside, yes, sir. [161]

Q. How much of the side, how much freeboard, in other words, did the float have?

A. One side it might have had about 2 inches, and the opposite corner was below water.

Q. Is that a normal or abnormal condition for a mooring float? A. It is an abnormal condition.

Q. What is normal?

A. The normal condition I would say, oh, 10 inches to a foot above the water. That is freeboard.

Q. On the float?

A. On the float. Well, the float gets wet occasionally, and it has some moss on it, but it is a different type of moss than the moss that accumulates when a float goes below the water.

(Testimony of Rudy Tomasic)

Q. Did you see this float the next day?

A. Yes, sir.

Q. And what did you observe then?

A. Well, the float still had the moss and it was undisturbed.

Q. Have you any opinion from what you observed there, and based on your experience as a seaman and handling those matters, as to the probable length of the anchoring cable running from the bottom of the float to the floor of the harbor? [162]

A. Well, I couldn't estimate the length that they had on it, but I believe it was short.

Q. What leads you to believe that?

A. The moss on the float, sir.

Q. During this time that you were having difficulty in getting the pendant free, where was the Rocona?

A. He was over on the port side of the barge.

Q. That is the left side of the barge?

A. Left side of the barge, yes, sir.

Q. Ahead, behind, parallel, or perpendicular to it, or what position did he occupy?

A. I would say he was just about parallel to it.

Q. About how far away from the barge?

A. Oh, it is hard for me to estimate that, because I was on the opposite side of the barge.

Q. You have no estimate of that? A. No, sir.

Q. Could you see them?

A. Yes, sir, I could see Captain Reeves.

Q. Where was he?

A. He was in the pilot-house looking through the window.

(Testimony of Rudy Tomasic)

Q. Was the window closed or open?

A. It was open. He had his head out.

Q. Did you see anybody else aboard the Rocona? [163]

A. I couldn't see Tom Gentle because he was back by the winch, standing by it, to let out cable or take in cable as the Captain ordered.

Q. Was the winch within your view?

A. No, sir.

Q. Was anybody with you aboard the barge?

A. No, sir.

Q. Mr. Tomasic, as you recall that incident that night and what occurred, did or did not the Barge 4414 override that mooring float? A. Absolutely not.

Q. How do you know that it didn't?

A. Because if that barge would have overrun that mooring float I would never have got ahold of that cable unless we made another pass at it.

Q. Did you feel any bump or any jar aboard the barge? A. No, sir.

Q. Did you hear any thud or crash or cracking?

A. Absolutely nothing, sir, outside of the normal noises that a barge always makes.

Q. That is a slapping sort of thing, isn't it?

A. That's right.

Q. What was the trim of the barge as you were attempting this effort?

A. She was approximately in the same trim as when we [164] picked her up at the Island.

(Testimony of Rudy Tomasic)

Q. Did you inspect for free water in the hold?

A. As I remember it we didn't check the hold, but Captain Reeves turned the light on it, and therefore you can tell just about how much is in it by checking the freeboard.

Q. When did he turn his light on it?

A. After we had turned loose of the barge he made a circle of the barge, turned his light on it, and when all was O. K. we went over to our berth.

Q. As you made fast the pendant from the mooring post to the Sampson post on the starboard corner of the barge what was the condition of the bridle and the line from the barge to the Rocona? A. The condition?

Q. Yes, taut, or was it attached, or where was it?

A. Well,—repeat that question, please.

The Court: Read the question.

(The following question was read by the reporter:)

“As you made fast the pendant from the mooring post to the Sampson post on the starboard corner of the barge what was the condition of the bridle and the line from the barge to the Rocona?”

The Witness: The line had no slack in it. Captain Reeves had the tug maneuvered in a position whereas he could back down without any undue movements. I would say the line [165] just had a slight strain on it.

Q. Was the barge making way at that time?

A. No, sir.

Q. Was she dead in the water? A. Yes, sir.

Q. Did you later cast off the bridle?

A. Yes, sir.

Q. From the barge? A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. When?

A. Captain Reeves asked me if everything was made fast, and I told him yes, sir, and he told me to cast off the wires, and I did.

Q. Did you have any difficulty hearing the Captain?

A. No, sir.

Q. Do you know if he used a megaphone?

A. He didn't use a megaphone.

Q. Did you later board the Rocona?

A. Yes, sir.

Q. When? A. After the wires were taken in.

Q. What part of the barge did you leave and what part of the Rocona did you land on as you made the crossing?

A. I went across the barge and left the port side and came aboard the starboard side of the Rocona. [166]

Q. Which way was she headed at that time? The Rocona, I mean.

A. She was heading, I believe, north, approximately north.

Q. Then what did you do and what did the Rocona do?

A. We went to 22nd Street and checked in with the Coast Guard, and then we went back to our berth and we were relieved by Captain McCarty.

The Court: Mr. Tomasic, you said that you didn't get on the mooring because it was covered with this wet moss. Is it customarily necessary for you to get on a float under the circumstances which prevailed on that particular night?

The Witness: Yes, sir, when a line is leading straight into the water and not on top of the float, well, when you get on the float you have got an easier pull if you have to pull it in by hand.

(Testimony of Rudy Tomasic)

The Court: But in this instance you pulled it up with your pipe pole until you could get ahold of it?

The Witness: Yes, sir.

The Court: Was it where you could see it easily?

The Witness: I could see where it led down, but then I had to fish for it with my pipe pole. It was like groping in the dark.

The Court: Go ahead, Mr. Scully.

Q. By Mr. Scully: Have you ever attended or assisted [167] at moorings of barges of this type to floats before? A. Yes, sir.

Q. Approximately how many times, Mr. Tomasic?

A. Before that actual date?

Q. Yes.

A. I would say for a period of seven or eight months.

Q. Was this operation—and I include in “operation” the maneuvering and actions of the tug, the orders of her master, and the result obtained—normal or abnormal according to the standards of recognized seamanship in and about Los Angeles Harbor? A. Normal, sir.

Mr. Scully: You may cross-examine.

The Court: You are going to have him read that log.

Mr. Scully: Yes. Thank you, your Honor.

Q. By Mr. Scully: I show you Exhibit B for respondents, Mr. Tomasic, and claimants, the log of the Rocona for the 31st of March, 1945; will you point out to me where the entry concerning the picking up of Barge 4414 at Catalina appears?

A. It is here, sir. (Indicating.)

Q. Read the entry.

A. “1:30 P. M. Leave quarry with two flats in tow, 4414 and 4412 for Atkinson & Pollack job, Long Beach.”

(Testimony of Rudy Tomasic)

Q. When?

A. Captain Reeves asked me if everything was made fast, and I told him yes, sir, and he told me to cast off the wires, and I did.

Q. Did you have any difficulty hearing the Captain?

A. No, sir.

Q. Do you know if he used a megaphone?

A. He didn't use a megaphone.

Q. Did you later board the Rocona?

A. Yes, sir.

Q. When? A. After the wires were taken in.

Q. What part of the barge did you leave and what part of the Rocona did you land on as you made the crossing?

A. I went across the barge and left the port side and came aboard the starboard side of the Rocona. [166]

Q. Which way was she headed at that time? The Rocona, I mean.

A. She was heading, I believe, north, approximately north.

Q. Then what did you do and what did the Rocona do?

A. We went to 22nd Street and checked in with the Coast Guard, and then we went back to our berth and we were relieved by Captain McCarty.

The Court: Mr. Tomasic, you said that you didn't get on the mooring because it was covered with this wet moss. Is it customarily necessary for you to get on a float under the circumstances which prevailed on that particular night?

The Witness: Yes, sir, when a line is leading straight into the water and not on top of the float, well, when you get on the float you have got an easier pull if you have to pull it in by hand.

(Testimony of Rudy Tomasic)

The Court: But in this instance you pulled it up with your pipe pole until you could get ahold of it?

The Witness: Yes, sir.

The Court: Was it where you could see it easily?

The Witness: I could see where it led down, but then I had to fish for it with my pipe pole. It was like groping in the dark.

The Court: Go ahead, Mr. Scully.

Q. By Mr. Scully: Have you ever attended or assisted [167] at moorings of barges of this type to floats before? A. Yes, sir.

Q. Approximately how many times, Mr. Tomasic?

A. Before that actual date?

Q. Yes.

A. I would say for a period of seven or eight months.

Q. Was this operation—and I include in “operation” the maneuvering and actions of the tug, the orders of her master, and the result obtained—normal or abnormal according to the standards of recognized seamanship in and about Los Angeles Harbor? A. Normal, sir.

Mr. Scully: You may cross-examine.

The Court: You are going to have him read that log.

Mr. Scully: Yes. Thank you, your Honor.

Q. By Mr. Scully: I show you Exhibit B for respondents, Mr. Tomasic, and claimants, the log of the Rocona for the 31st of March, 1945; will you point out to me where the entry concerning the picking up of Barge 4414 at Catalina appears?

A. It is here, sir. (Indicating.)

Q. Read the entry.

A. “1:30 P. M. Leave quarry with two flats in tow, 4414 and 4412 for Atkinson & Pollack job, Long Beach.”

(Testimony of Rudy Tomasic)

Q. That "A & P" is what you refer to as Atkinson & [168] Pollack? A. Yes, sir.

Q. The rest of it?

A. "11:30 P. M. Clear breakwater east entrance with tow.

"11:40 P. M. Clear net." He has "Navy" here. It is Navy net.

Q. This net we have been talking about refers to submarine net, being wartime at that time?

A. Yes.

"Arrived at mole with tow 12:10 P. M."

Q. Now, we refer to sheet 1361, the entry for 12:45.

A. "Start 12:10 A. M. Stop 12:45 A. M."

Q. That is April 1st, 1945?

A. April 1st, 1945. "Heave in wire; give 4412 to Dispatch and hung up 4414 to mooring."

Q. What does that hung up mean?

A. That is to secure.

Q. It doesn't indicate any abnormal grounding or collision, does it? A. No, sir.

Q. What time did you check out?

A. We left the barge at 12:45 A. M. and arrived at our berth, arrived at 22nd Street, the Coast Guard station, 1:05 A. M., we departed from there at 1:05 A. M. and arrived [169] at our berth, berth 94, at 1:20 A. M. At 1:30 A. M. we were relieved by Captain McCarty and crew.

Q. Sheet 1362 is further logging for the 1st of April, 1945. Please read that and tell me what the actions—

The Court: What is the importance of that?

Mr. Scully: I don't know whether it is in the stipulation or not, I think it is in the pleadings, that the Rocona

(Testimony of Rudy Tomasic)

was called back to assist in towing this damaged barge about the harbor to relieve her of some of her rock. This log shows she didn't do that at all. She made up another tow and proceeded to sea.

Mr. Toner: I believe the testimony yesterday was the Fortuna was the tug—

Mr. Scully: This wouldn't be material, if counsel will agree with me that the Rocona did not come back; that the Fortuna did.

Mr. Toner: Yes, we agree to that.

Mr. Scully: Very well. It isn't necessary to go further with that.

The Court: Proceed with the cross-examination.

Cross-Examination

By Mr. Toner:

Q. Mr. Tomasic, how old are you now?

A. Twenty-six.

Q. At the time of this accident you had had seven or [170] eight months of experience in mooring these barges?

A. On this particular job, yes, sir, this type.

The Court: Read the last question and answer.

(The question and answer were read by the reporter.)

Q. By Mr. Toner: When you took the barge at Catalina Island, did you feel she was perfectly seaworthy to make the trip? A. Yes, sir.

Q. And it is the tug's duty to see that she is seaworthy?

A. It is the captain's duty, the captain of the tug, to see that she is seaworthy, or not accept it.

Q. Pardon?

A. If not seaworthy the captain won't accept it.

(Testimony of Rudy Tomasic)

Q. Did the barge have any pumps aboard her?

A. 4414?

Q. Yes. A. Not that I know of.

Q. Isn't it usual for barges to have pumps aboard?

A. No, sir.

Q. At what speed did you tow the barges from the harbor entrance to the point where you turned them over to the Dispatch?

A. At approximately—from the harbor entrance, from the time we entered the harbor? Well, slowing down for the [171] Navy net, I believe we slowed right down and proceeded at slow speed, because at that time the Coast Guard was pretty hot around that district, and I would say we didn't proceed at more than two.

Q. At not more than two knots? A. No, sir.

Q. After you turned the Barge 4412, I believe you said— A. Yes, sir.

Q. —over to the Dispatch, then you proceeded at one knot? A. Yes, sir.

Q. At about half the speed?

A. Yes, about half the speed.

Q. I believe you said you went through the net and the gate? A. Yes, sir.

Q. How long did that take you?

A. Maybe 10 or 15 minutes.

Q. Did you have to stop there?

A. We had to slow down until they opened the gates and the net. Usually they were waiting for us.

Q. Did you have to make a report to the Coast Guard and identify yourself? A. Yes, sir.

Q. And all of that took 10 or 15 minutes? [172]

A. Yes, sir.

(Testimony of Rudy Tomasic)

Q. Where is the gate and the net?

A. The net is not shown now.

Q. Will you draw it in where it was?

A. The net came from this Rainbow Pier—

Q. Draw the gate in, too.

A. I would say the gate was—about that position here (indicating).

Q. Will you mark “Net” on the line you have drawn as “Net” and mark “Gate” to identify the marks you have made on the gate?

(Witness does as requested.)

Q. I believe you testified that you arrived off the harbor entrance at 11:30.

A. Yes, sir.

Q. And you went through the net at about 11:40?

A. I believe so.

Q. And you arrived at the point where you turned the Barge 4412 over to the Dispatch at about 12:10 according to the log, is that right?

A. Yes, sir.

Q. And from 12:10 to 12:45 you were mooring the Barge 4414?

A. Yes, sir.

Q. How was the tow made up? How were these barges [173] towed? In what order?

A. I believe that 4414 was the last barge and 4412 was the first barge.

Q. When you are at sea you have a long towline, don't you, about a thousand feet towline on the winch?

A. The actual length I don't know, but there is a long towline.

Q. It is approximately a thousand feet, isn't it?

A. Yes, sir.

The Court: He said he didn't know.

(Testimony of Rudy Tomasic)

Mr. Toner: He said approximately.

Q. By Mr. Toner: Then at the end of the towline you run to about a 40 or 50-foot bridle, is that correct?

A. That is correct.

Q. And that bridle extends down to each of the Sampson posts on the bow of the first barge?

A. Yes, sir.

Q. Then there is a bridle on the stern of the first barge, isn't there?

A. There is not a bridle on the stern of the first barge.

Q. How is that affixed?

A. Your bridles make fast to your main towline, there is a coupling there, and then also to that coupling is coupled another towline which goes under the first barge and up on the [174] bow of the second barge.

Q. And then there is another bridle on the bow of the second barge? A. That's right.

Q. How much towline is there between the two barges?

A. I can't say as to that.

Q. Is it 50 feet or is it a thousand feet, or what?

A. Well, I can't tell you how much they had there, because—

Q. You have done a lot of towing in the daytime?

A. That's right.

Q. What is the customary practice?

A. Well, it varies on who is doing the towing.

Q. What did you do on the Rocona?

A. What did I do on the Rocona?

Q. What did the Rocona do?

A. At which point?

(Testimony of Rudy Tomasic)

Q. In making up the tow, separating the two barges.

A. Well, first of all in making up the tow the Rocona would go back to the barge that is second in line in towing, put her bridles on, and then run up to the other barge, run out the cable, and go up to the other barge, and then put the bridles on her and then take off to sea.

The Court: If I understand your testimony, Mr. Tomasic, the second barge was not attached to the first barge for the [175] purpose of towing.

The Witness: No, sir.

The Court: But the towline of the second barge went under the first barge.

The Witness: That's right, sir.

The Court: So that there wouldn't be a strain on the barges?

The Witness: That's right, sir.

Q. By Mr. Toner: How much distance was there between the two barges, approximately?

A. I would make a guess at about 300 feet.

Q. When you towed the two barges into the harbor did you shorten the distance between the two barges?

A. No, sir.

Q. You merely shortened the distance between the tug and the first barge? A. Yes, sir.

Q. You heard Captain Reeves testify yesterday that he saw the float at about a thousand to 1200 feet. Is that about the distance that the float was away when he turned the spotlight on it?

A. I couldn't swear to that, because I couldn't see the mooring at that time because I was lower on the barge than he was, but I seen the mooring in the light as soon as we came up to the point where I could see it. [176]

(Testimony of Rudy Tomasic)

Mr. Toner: He said approximately.

Q. By Mr. Toner: Then at the end of the towline you run to about a 40 or 50-foot bridle, is that correct?

A. That is correct.

Q. And that bridle extends down to each of the Sampson posts on the bow of the first barge?

A. Yes, sir.

Q. Then there is a bridle on the stern of the first barge, isn't there?

A. There is not a bridle on the stern of the first barge.

Q. How is that affixed?

A. Your bridles make fast to your main towline, there is a coupling there, and then also to that coupling is coupled another towline which goes under the first barge and up on the [174] bow of the second barge.

Q. And then there is another bridle on the bow of the second barge? A. That's right.

Q. How much towline is there between the two barges?

A. I can't say as to that.

Q. Is it 50 feet or is it a thousand feet, or what?

A. Well, I can't tell you how much they had there, because—

Q. You have done a lot of towing in the daytime?

A. That's right.

Q. What is the customary practice?

A. Well, it varies on who is doing the towing.

Q. What did you do on the Rocona?

A. What did I do on the Rocona?

Q. What did the Rocona do?

A. At which point?

(Testimony of Rudy Tomasic)

Q. In making up the tow, separating the two barges.

A. Well, first of all in making up the tow the Rocona would go back to the barge that is second in line in towing, put her bridles on, and then run up to the other barge, run out the cable, and go up to the other barge, and then put the bridles on her and then take off to sea.

The Court: If I understand your testimony, Mr. Tomasic, the second barge was not attached to the first barge for the [175] purpose of towing.

The Witness: No, sir.

The Court: But the towline of the second barge went under the first barge.

The Witness: That's right, sir.

The Court: So that there wouldn't be a strain on the barges?

The Witness: That's right, sir.

Q. By Mr. Toner: How much distance was there between the two barges, approximately?

A. I would make a guess at about 300 feet.

Q. When you towed the two barges into the harbor did you shorten the distance between the two barges?

A. No, sir.

Q. You merely shortened the distance between the tug and the first barge? A. Yes, sir.

Q. You heard Captain Reeves testify yesterday that he saw the float at about a thousand to 1200 feet. Is that about the distance that the float was away when he turned the spotlight on it?

A. I couldn't swear to that, because I couldn't see the mooring at that time because I was lower on the barge than he was, but I seen the mooring in the light as soon as we came up to the point where I could see it. [176]

(Testimony of Rudy Tomasic)

Q. And about how far off was she when you could see it? A. Three-quarters of that.

Q. That would be from 750 feet to a thousand feet?

A. That's right.

Q. You heard Captain Reeves testify yesterday that he shut off the power when the barge was about 100 feet from the float, is that correct? A. I believe so.

Q. And he so testified yesterday? A. Yes.

Q. And your estimate today is that it is 200 feet?

A. I believe it was between 150, 200 feet, somewhere along that. I can't swear to the actual distance.

Q. What we want is your approximate idea. Would you say 100 to 200 feet? A. Yes.

Q. When Captain Reeves shut off the power?

A. Yes.

Q. And the barge continued forward on its momentum, didn't it? A. Very slowly, yes, sir.

Q. Shortly after the accident you made a statement that the barge was almost at a dead stop when you arrived at the mooring float? [177] A. Yes, sir.

Q. That is correct, isn't it? A. Yes, sir.

Q. That is the substance of your testimony today?

A. Yes, sir.

Q. When you got aboard the barge you used a pipe pole, didn't you? Or you brought a pipe pole with you, didn't you? A. Yes, sir.

Q. What was the purpose of that?

A. To reach over on the mooring and get the cable, or to reach down into the water and get the cable.

Q. From the barge? A. That's right.

(Testimony of Rudy Tomasic)

Q. It was just as easy, wasn't it, to pull the cable up from the barge as it would be from the mooring float, isn't that so?

A. If the cable was on top of the mooring, not down into the water.

Q. But it would be more difficult, would it, to pull the cable up from the barge if the cable was in the water?

A. Yes, sir.

Q. Why?

A. Because the cable hangs straight down and you are pulling over, you are pulling against the mooring and against [178] the cable. If you get on the mooring you have got a straight up-and-down pull.

Q. You mean you are pulling the cable over the mooring if you are pulling on the barge?

A. No, sir. Say your barge is right here (indicating), or your mooring, and you are on the barge, the top of that cable is secured in the mooring, am I correct?

Q. Yes.

A. When you are pulling up you have got some strain against the mooring and you are pulling two things at one time.

Q. You state that sometimes the barge will go by the float?

A. Yes, sir.

Q. And that is when the barge is pulled in too fast?

A. Not necessarily. The barge can be off a little bit, and sometimes I make a pass at the cable and I don't always get it.

Q. So that if the barge goes past—as the barge goes past the float you try to hook the cable with the boat-hook?

A. If the captain stops the barge there I can reach over and get it. A barge is never dead in the water

(Testimony of Rudy Tomasic)

actually, there is always some motion, and the current might take her by when the barge is dead. Under normal conditions a lot of [179] times you miss it, just get it almost up to you and then you drop it.

Q. And then you have to make another pass at it?

A. Sometimes you can reach it and sometimes you make another pass as it, yes, sir.

Q. And it is normal practice to come up to the mooring float and try to catch the mooring pendant as you approach the mooring float?

A. After the captain gives you the O. K. to put it on you can grab at any time you please. But you don't put it on until the captain says it is time to put it on. Sometimes a barge would come in too fast. I have worked with other skippers where they have brought the barge in too fast and you don't even get time to put it on the mooring.

Q. What do you do then?

A. Drop it and wait for the captain to come back around.

Q. What happens, does the mooring go by the barge?

A. Goes by the barge. They bring the corner of the barge into the mooring, not headon, they bring either one corner or the other corner, because there is no bit—on some barges there is—but you don't make it a practice to tie to the bit in the center. You always tie to one of the corner bits.

Q. Didn't you come in with tying to both bits, bridle [180] tied to both bits?

A. Yes, but you slip the mooring pendant under the bridle and over the Sampson post. That way you take your bridle off when you are through and just throw it over.

(Testimony of Rudy Tomasic)

Q. I am not sure that I understand that, because that was the next question I was going to ask you. How do you get the bridle off of the Sampson post after you have put the mooring pendant eye over the Sampson post?

A. I can't word it, but if you give me a piece of paper I can draw you the diagram. Here is the top of your Sampson post (indicating).

Q. This is a top view?

A. Top view, yes. Here is, we will say, one of your towing cables.

Q. That is what we have been referring to as bridle?

A. Yes. Here is your mooring, and here is your pendant; you take the eye of your pendant and lead it up to this point (indicating) and put it over. Therefore you can just take it and lift the bridle right over.

Q. Will you draw in the corner of the barge there?

A. Yes, sir.

(Witness does as requested.)

Q. Where were you standing on the barge when you grabbed at the mooring pendant?

A. (Witness indicates on diagram.) [181]

Q. How much space is there between the Sampson post and the starboard side of the bow?

A. You mean this corner right here?

Q. Yes. A. Perhaps six feet.

Q. And how much space is there between the forward part of the Sampson post and the bow of the barge?

A. I believe the distance is a little bit greater. I would say eight, maybe ten feet.

Q. Eight or ten feet?

Mr. Toner: I think perhaps we can offer this little diagram in evidence.

(Testimony of Rudy Tomasic)

Mr. Scully: No objection.

Mr. Toner: As Libelant's Exhibit 5.

The Court: Let it be received and so marked.

(The diagram referred to was marked Libelant's Exhibit 5, and was received in evidence.)

Q. By Mr. Toner: When you are coming in and making a pass at the mooring float, and you catch the mooring pendant, and you are able to slip it over the Sampson post, and the barge is still moving, what happens?

A. Well, if the barge is moving slow—if it is moving fast you don't even attempt it—but if the barge is just moving barely in the water you put it on, and then when the barge gets tight against the post, against the mooring, [182] the barge has a tendency to swing away from the mooring block.

Q. And swing out and everything is all stretched out in the direction of the swing, is that right?

A. That is right, sir.

Q. So that the mooring pendant runs from the bow of the barge up to the mooring float and then—

A. The barge hangs out behind it.

Q. That is correct. Does the barge ever come up against the scope of the length of line that you have there in that case?

A. Well, sometimes.

Q. What happens then?

A. Just as I have explained it to you, the barge swings away from the mooring.

Q. Supposing the anchor chain of the mooring float is extending aft along the line of the barge, does the barge ever come up with a bump against the scope of the mooring pendant and the anchor chain?

A. I don't understand your question, sir.

(Testimony of Rudy Tomasic)

Q. Let's say you are making a pass at the mooring float going in the direction of the wind?

A. Into the wind?

Q. Going downwind. And the mooring float would be here, and your mooring float and anchor would be down here, upward, wouldn't it? [183]

A. Yes.

Q. If your barge is coming in, going downwind, and you make a pass at the mooring float pendant, and you catch it, and you put it over the Sampson post and the barge goes by, what happens when you reach the end of the scope of the pendant?

A. In the first place, any captain who goes downwind with the barge is no captain, in the first place. The procedure is you come up the wind with the barge. In the second place, if that was to happen that barge would swing, actually swing away from the mooring. It wouldn't even come close to it.

Q. Would there be a possibility of its coming up hard against the end of the scope of the mooring pendant?

A. Well, if it would come up—

Q. I say is there a possibility that it would.

A. I believe there is a possibility, yes.

Q. What would happen then?

A. I believe you would either break your anchor chain or knock the Sampson post off.

Q. Would that have a tendency to drag the mooring float under water when it came up?

A. It would have a tendency to drag the float out of the water.

Q. Wouldn't it stretch out the anchor chain and the [184] mooring pendant to about a straight line?

A. About a straight line?

(Testimony of Rudy Tomasic)

Q. Yes, as you pull against the—

A. Do you mean on an angle up from the bottom?

Q. Yes.

A. It would lift one corner or half your block out of water, and the other half would be in the water; but it would be away from your barge.

Q. It would be in a straight line, however?

A. Yes, sir.

Q. Suppose you had missed your pass at the mooring pendant as you were coming in, as you did that night with the barge almost at a dead stop, would you have had to make another pass at the mooring float?

Mr. Scully: Just a moment. I am sure you don't mean to imply in it, counsel, as you did, that night, the missing of a pass at the float. You first put in about missing.

The Court: Read the question.

(The question was read.)

Mr. Scully: The wording is subject to that interpretation.

The Court: It might possibly be. Reframe your question.

Q. By Mr. Toner: Assume, Mr. Tomasic, that you were approaching the barge at almost a dead stop, approaching the mooring float at almost a dead stop, as you have testified, [185] and you missed the mooring pendant as you grabbed for it?

A. If I missed that mooring pendant I had plenty of time to make another pass at it.

Q. You wouldn't have had to go around and take another—

A. No, sir.

(Testimony of Rudy Tomasic)

Q. How far would the barge overrun the mooring float? A. Overrun the mooring float?

Q. Would it go by? A. At almost a dead stop?

Q. Yes.

A. As I have testified, that cable there is about 40 feet, and if that barge was moving I could let her go 30 feet and put her on and still not lose anything by it.

The Court: You mean you could still have reached down and gotten the pendant with your pipe pole, is that it?

The Witness: I could have walked back along the barge here and reached it. As a matter of fact, sometimes you have to do that and walk forward with it and put it on.

Q. By Mr. Toner: You figure you were 1500 feet away from the mole at the time?

A. That is my own estimate. Where the actual spot was is up to the surveyors.

Q. Where was the derrick barge that was unloading this rock? [186]

A. I believe there was one on the inside, and what other barges they had there at the time I don't remember.

Q. What was the closest vessel to the mooring float where you moored Barge 4414?

The Court: Read the question.

(The question was read.)

A. Well. I don't think there was a vessel around, but I believe there was two barges, two empty barges waiting to go out, hanging on another mooring.

Q. How far away were they?

A. Oh. it was quite a distance. A quarter of a mile, three-quarters, or so.

(Testimony of Rudy Tomasic)

Q. Were there any lights on those barges?

A. I believe there were.

Q. There were?

A. At night it is the procedure of the crew that takes care of the barges while they are in, the mound crew, to go out and put the lights on the barges. Otherwise, if there is a collision, someone runs into it, they are liable.

Q. And they are about a quarter of a mile away?

A. Yes, I believe about a quarter of a mile.

Q. Were there lights on the mole on the derrick barge?

A. I believe there were.

Q. What lights did you have on the tug?

A. What lights did we have on the tug? [187]

Q. Yes. Did you have your deck lights on?

A. We had our deck lights on, our running lights, tow lights, spotlight. As a matter of fact, we had everything going.

Q. Was there any light on the barge?

A. Yes, sir. Not actually installed on the barge. I always carried a flashlight with me, three-cell flashlight. And also from the after part of the tug there is a light that shines over on the barge, or if the tug is alongside the barge the side lights shine over.

Q. Was the mooring float when you were struggling with this pendant forward of the bow of the barge or was it alongside of the starboard bow?

A. It was approximately alongside of the starboard bow.

Q. What do you mean approximately alongside?

A. Well, it was just about on the corner. Like your barge is so (indicating), I believe it was right there (indicating).

(Testimony of Rudy Tomasic)

Q. About at the corner? A. Yes.

Q. Not in front of the barge?

A. Not in front of the barge, no.

Q. You said one corner of it was down?

A. Yes, sir. [188]

Q. You don't know how long an anchor line—

The Court: Do you remember which corner it was with relation to the barge?

The Witness: The corner of the—

The Court: The float that was down.

The Witness: No, sir.

Q. By Mr. Toner: Was it the near corner or the far corner?

A. Those floats, they have a way of changing, they shift around to different positions, and I couldn't swear—

Q. You don't remember? A. No, sir.

Q. It might have been the near corner?

A. It might have been the near corner; it might have been the far corner. That I don't remember.

Q. Is it customary to make a circle of the barge after mooring? A. Yes, sir.

Q. What is the purpose of that?

A. To insure the safety of the barge, make sure that she isn't listing. If she is, to report it to the mound crew.

The Court: Did you do that on that night?

The Witness: We made our circle, but we didn't have anything to report. [189]

The Court: I know. What I am asking you is did you make the circle.

The Witness: Yes, sir.

The Court: Did you observe the barge and the mooring as you made the circle?

(Testimony of Rudy Tomasic)

The Witness: Yes, sir.

The Court: By what light did you observe it?

The Witness: Well, as we made our circle pretty close I was standing at that time on the after part of the deck, back by the tow winch, I could observe it through the side lights of the tug. Captain Reeves probably seen it in the searchlight.

Q. By Mr. Toner: You heard Captain Reeves say before he left the barge he didn't notice the mooring float, he didn't pay any particular attention to it?

A. That is right.

Q. Did you happen to see the mooring float?

A. Yes, sir.

Q. You actually saw the mooring float?

A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. Where was it then?

A. It was right off the corner of the barge, the barge had moved a little bit and had— [190]

Q. Which way had the barge moved?

A. That I can't say. Most of the times after you tie up a barge it shifts with the direction of the current or the wind.

Q. Where was the mooring float with reference to the starboard forward corner when you saw it?

A. The mooring float was just off the corner.

Q. You say it had moved some? A. Yes.

Q. Had it moved out or—

A. It moved away from it.

Q. Forward? A. I believe it moved back.

Q. You believe it moved back? A. Yes.

Q. Backward on the barge? A. Yes.

(Testimony of Rudy Tomasic)

Q. So that it was alongside of the starboard side of the barge?

A. I meant that the barge had moved back; not the mooring float. The mooring float stands still.

Q. Yes, of course. I meant the moving of the mooring float with reference to the barge.

The Court: He said the mooring float didn't move.

Mr. Toner: That is right. It would be the barge that [191] would be moving.

Q. By Mr. Toner: Do you remember Captain Reeves asking you something about, "Is she O. K.?"

A. That happens with every barge—

The Court: Do you remember it on this occasion whether he did or not?

The Witness: I believe he did.

Q. By Mr. Toner: When was that that he asked you if it was O. K.? A. After I made her fast.

Q. What did you say? A. I said, "Yes, sir."

Q. What time had you expected to be in that night?

A. It had been my off watch when we came in, and I had just got up before we got in, and I didn't really know what time it was, what time it would actually be when we got in, because sometimes the mound men call you back and want you to dump a barge. We have no way of knowing that.

Q. Were you working on a salary? A. Yes, sir.

Q. Was Reeves working on a salary?

A. Yes, sir.

Q. Was Gentle working on a salary?

A. Yes, sir.

Q. What time would you have been off duty had you [192] gotten in before 12:00 o'clock?

A. Had we got in before 12:00?

(Testimony of Rudy Tomasic)

there was actually scratches on the mooring now. For all I know those scratches were on it before we even tied up, because other barges occasionally tied up there.

Q. You never saw the damage to the bottom of the barge?

A. No, I never looked at the actual damage to the bottom of the barge. I have seen—

The Court: Did you go there when the barge was capsized?

The Witness: Yes.

The Court: Didn't you look at the hole?

The Witness: No, sir.

Q. By Mr. Toner: Did you have any conversation with [195] any of the employees of the Guy F. Atkinson Company concerning this damage or this accident?

A. Not that I remember. Like on every job there is always talk, you are always talking to somebody. I don't remember if I told anyone anything about the accident or even if I mentioned it. That has been three years ago. I don't remember if I told anyone anything. If I did, I don't remember.

Q. Do you remember anybody telling you that the Tug Rocona pulled the barge over the float?

A. I have heard that now for three years off and on. But I have also heard of other incidents.

Q. Have you heard of other tugs pulling barges over floats? A. It happens.

Q. It is not an unusual thing?

A. It is not too unusual, no.

Mr. Toner: That is all.

(Testimony of Rudy Tomasic)

Redirect Examination

By Mr. Scully:

Q. When this occurs on other instances, others you have heard about, barges being pulled over floats, what is the normal result and the usual result?

A. There isn't any that I know of. I haven't heard of any damage being done. [196]

Q. It doesn't usually cause damage, then, as a necessary result of being towed over a float?

A. No, sir.

Mr. Scully: That is all.

The Court: The court will recess for a few minutes.

Mr. Toner: May I ask one further question?

The Court: Yes.

Recross Examination

By Mr. Toner:

Q. As a matter of fact, Mr. Tomasic, you were on the Rocona when she pulled a barge off a mooring float that some other tug had pulled onto it, weren't you?

A. Are you accounting to Captain Reeves' statement?

Q. Yes.

A. After I left Case I went in the service, and Captain Reeves continued working, and then he went with Johnson Western on the breakwater job that is going now, and I believe that is where his statement came from. When I went back to that job—

The Court: Were you there?

The Witness: No.

Q. By Mr. Toner: You were never on the Rocona or any other tug?

A. I have been on other tugs when they pulled them off.

(Testimony of Rudy Tomasic)

The Court: This refers to the Rocona. Were you on the [197] Rocona when she pulled any other barge off of a float?

The Witness: Not on the Rocona.

Q. By Mr. Toner: But on another tug?

The Witness: On another tug, yes.

Mr. Toner: That is all.

Mr. Scully: That is all. May the witness be excused, your Honor?

The Court: Yes, he may be excused as far as the court is concerned.

Mr. Toner: As far as I am concerned, too, your Honor.

The Court: Court will recess for a few minutes.

(A recess was taken.)

Mr. Scully: Call Mr. Gentle.

THOMAS J. GENTLE,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Thomas J. Gentle.

Direct Examination

By Mr. Scully:

Q. What is your residence and occupation?

A. I am a towboat man living at 1272 West 14th Street, San Pedro.

Q. How long have you been in such occupation?

A. Three years. [198]

(Testimony of Thomas J. Gentle)

Q. On the 31st of March, 1945, were you aboard the Tug Rocona in the waters in and about Los Angeles Harbor?
A. Yes, sir.

Q. Did you have occasion to see the Rocona pick up the tow of an Atkinson barge, No. 4414, at Catalina Island on that date?

A. I was aboard the tug on that date when she was picked up, yes.

Q. What were your duties aboard the tug?

A. Deckhand.

Q. Who else was aboard the tug?

A. Captain E. A. Reeves was the master; Budreaux was the engineer; I can't think of his first name; and Tomasic was the other deckhand.

Q. During towing operations—and by such operations I mean during the time that mooring of any tow is accomplished—where on the vessel does the engineer perform his duties? Where is he located?

A. Are you speaking of the Rocona?

Q. Yes.

A. He is below deck at the engine control.

Q. There were two barges, I believe, towed by the Rocona from Catalina that day?
A. Yes, sir.

Q. What position in the tow did the 4414 occupy?
[199] A. She was the after tow.

Q. At sea about how far astern of the forward tow was the 4414?

A. The question again, please?

(The question was read.)

The Witness: The bow end of the after tow was approximately 430 feet from the forward tow.

(Testimony of Thomas J. Gentle)

Q. By Mr. Scully: What causes you to say that particular figure?

A. 400 feet of pigtail—pardon me. 500 feet of pigtail and approximately 35 to 40 feet of bridles.

Q. I refer you to Libellant's Exhibit 4, which is a chart, and ask you if you recognize the breakwater that is shown thereon.

A. As she sits here now I don't, because I can't see it.

(The exhibit was rearranged.)

A. Yes, sir.

Q. Showing two entrances, a westerly and easterly entrance? A. Yes.

Q. Which entrance did the Rocona and her tows enter on the 31st of March, 1945?

A. She entered the east gate.

Q. Do you recall that there was a submarine net there [200] at that time? A. There was.

Q. And a gate there, too? A. Yes.

Q. I call your attention to the entries on the map designated "Net" and designated "Gate" and ask you if that represents the approximate locations of those items at that time.

A. Yes, the gate was right square of the main channel in the 44-foot depth.

Q. As I believe the facts are, the forward tow was delivered to another tug after the entry through the breakwater that evening, is that correct?

A. That is true.

Q. Where did that delivery occur with reference to the easterly gate to the breakwater?

A. Well, let's see. Approximately north northwest of the gate a quarter of a mile off of the inside entrance

(Testimony of Thomas J. Gentle)

to Long Beach Harbor, a quarter to a third of a mile. I can't be too sure of that.

Q. Describe the operations by which that delivery was made.

A. Well, the main tow wire was brought hard up against the winch.

Q. What do you mean by that, Mr. Gentle, to bring a tow [201] wire hard up against a winch?

A. I brought the bridles right up to the winch of the forward tow, and then the wires were taken off the first barge and we pulled them aboard, which relieves the first barge to the Dispatch No. 2.

Q. At that particular point that first barge which was being turned over to Dispatch No. 2 was then free of all control for a short period of time, do I understand that correctly?

A. I can't say on that, because I can't remember whether they made up alongside of it or whether they took it on a string, sir.

Q. What happened with respect to the Rocona and the 4414 then, after delivery was made of the other barge?

A. Read the question again, please.

(The question was read.)

The Witness: Inasmuch as the Rocona has an air winch and we have a limited amount of supply of air, we have to proceed at a very slow rate, otherwise have no maneuverability of the boat, so at a slow bell she was run from that point to the most westerly mooring.

The Court: Was there any shortening of the line between the—

The Witness: Yes. I am sorry, sir.

(Testimony of Thomas J. Gentle)

Q. By Mr. Scully: Will you describe that, please, Mr. [202] Gentle, the shortening of the line?

A. The shortening of the line can't take place then until we have made up enough air, which takes approximately 15 minutes, something like that, and then it is reeled up—that is, the pigtail of the wire, it is not our main tow wire, but the pigtail is reeled onto the drum also.

The Court: The distance between the 4414 and the Rocona was shortened, wasn't it?

The Witness: Yes, sir.

Q. By Mr. Scully: To what distance, approximately?

A. I imagine the pigtail was hanging over the stern right around 20 feet, which would make approximately 60 feet between the stern of the Rocona and the 4414.

Q. The bow of the 4414?

A. The bow of the 4414.

Q. You proceeded, then, to the most westerly mooring float, you said? A. That is right, sir.

Q. What was the greatest speed attained during that particular portion of the trip?

A. I can't say, sir.

Q. Have you any recollection at all?

A. I am sure we ran at a slow bell, and utilizing 360 horsepower with one tow the Rocona only makes four knots.

Q. How far was it from the place where you shortened [203] your line to the 4414 and proceeded to the most westerly mooring float?

A. I would have to measure it here on the chart. That is about the only way I could answer that question, sir.

(Testimony of Thomas J. Gentle)

Q. That chart has a representative fraction of 1 over 12,000. Would that help you?

The Court: Show him one of those squares that represents a—

Q. By Mr. Scully: These grids represent a nautical mile.

A. May I point to where I believe we were relieved of the first—

Q. I am going to ask you to place that on the map with a pencil mark and mark it "G-1," please.

The Court: We are getting so many marks on here, Mr. Gentle, will you please use this red pencil.

The Witness: Yes. I would say we were relieved right out in here (indicating).

Mr. Scully: Mark it "G-1."

The Court: Mark a cross there first.

The Witness: All right, I will put a cross there.

The Court: And mark it "G-1."

(Witness does as requested.)

Q. By Mr. Scully: Is that where you shortened your line, you say? [204]

A. That is where we were shortening our line and we were relieved of the first barge right there.

Q. Where is the mooring float to which you proceeded? Mark it "G-2," after designating it with an "X". These grids are nautical miles.

A. I can't say. I couldn't place it within four or five hundred yards. But it was up in this sector (indicating).

Q. Realizing that it is but an approximation—

A. Where was this finished to at this time? Then perhaps I can give you a better answer.

(Testimony of Thomas J. Gentle)

Q. This shows the mole as it stands today.

A. I know it does.

Q. Do you have any recollection yourself as to the extent of its completion on the day in question, March 31, 1945?

A. Well, they had come around the bend here, I am pretty sure, right around in here is where the minus 10 was.

Q. What do you mean by "minus 10"?

A. Well, they dumped to minus 10.

Q. Is that a craft?

A. I beg your pardon?

Q. Is that a craft?

A. No. They dump rock, shove it off the barges with shovels, and things like that, until it gets up to be minus 10, then they no longer—

The Court: Just put a mark there where you think was [205] about the end.

Q. By Mr. Scully: Mark it "G-2."

A. I would say right about in here (indicating). It is somewhere around in here.

The Court: About the end of the mole at that time?

The Witness: Yes.

The Court: In what direction from "G-2" was the mooring where you moored the barge?

The Witness: It was right out in here. There used to be a red light out in here, and it was very close in here.

Q. By Mr. Scully: Mark it "G-3" wherever you think it was. A. O. K.

Q. With an "X" to designate the spot.

A. All right.

(Testimony of Thomas J. Gentle)

Q. About how far was the point "G-3" from the nearest earth works or land works?

A. I don't believe it was over 400 feet, four, five hundred.

Q. Approximately what you have shown as your markings "G-1" and "G-3," according to the scale of the map it would indicate approximately a mile between the two. Was it that far? And if it was not, what is your best estimate of the distance?

A. I think it was a mile, myself, because it would take us quite a little time to get up there. [206]

The Court: He stated he thinks about a mile. Go ahead, Mr. Scully.

Q. By Mr. Scully: As you approached the mooring float will you describe the actions of the Rocona and the barge as you observed them?

A. We were running under a dead slow bell, I paid no attention to the float myself until it came alongside.

Q. Did you observe what way the 4414 had on her?

A. We were running at a full dead slow bell up to the last few minutes when he shut off.

Q. What in your recollection would that mean in knots per hour?

A. She couldn't have been traveling—this is strictly a guess, because after all one never knows until you can measure it, but I would say around half to three-quarters of a knot.

Q. Did you see the mooring of 4414 to the float?

A. No, not exactly. Being at the after winch I saw the mooring approaching the starboard side of the barge, and then Captain Reeves moving off to port backed down to where we were lying approximately alongside, just a

(Testimony of Thomas J. Gentle)

little bit forward of the bow with the stern approximately 20 or 30 feet aft of the bow.

Q. At that point what was the distance, approximately, between the barge and the Rocona? [207]

A. We were laying about 10 or 15 off, I guess.

Q. Was there any tension on the line?

A. No, sir.

Q. When did the Rocona slack off and drop tension from the line?

A. He had dropped tension approximately 100, 150, 200 feet away with slight maneuvers to get her to head into the correct position.

Q. Did the Rocona thereafter exert a pull upon the 4414? A. The question, please?

(The question was read.)

The Witness: "Thereafter"—I don't get it.

Q. By Mr. Scully: After she dropped her tension off that line and you were coming up to the mooring float, thereafter did the Rocona do any pulling of the 4414?

A. Not pulling. Only maneuvering.

Q. What do you mean by that?

A. Well, after all you have got to keep this barge going in a direct line, and being off to the side you can swing her or just come up against the line just enough to swing the barge. You couldn't hope to shut off your power 150 feet away or 200 feet away and have the barge run directly in a direct line right to the float. It would be unusual.

Q. Did you see Mr. Tomasic aboard the barge? [208]

A. Yes, sir.

Q. Did you see him attempting, or mooring the barge to the float? A. No, sir.

(Testimony of Thomas J. Gentle)

Q. Why?

A. Well, I was too far aft and the rock on the barge obscured my view, and particularly wasn't interested, anyway.

Q. Was there rock topside of the hatches aboard the barge?

A. No, sir; they had a bulkhead to stop it from coming up there.

The Court: In other words, the hatches were left free, is that right.

The Witness: That's right, sir.

Q. By Mr. Scully: Do you know whether or not the Rocona towed or otherwise caused Barge 4414 to run over the mooring float?

A. No, sir.

Q. You don't know?

A. No, sir.

The Court: What is the answer?

(The answer was read.)

Q. By Mr. Scully: Did you see the mooring float after that evening?

A. No, sir. [209]

Q. Did you see it the next day?

A. Yes, sir.

Q. What did you observe?

A. I observed that there was no great disturbance of moss on this mooring float, and also that several pieces of 4 by 4 had been built in a bulkhead around the iron ring on top.

The Court: Read the last answer, please.

(The answer was read.)

The Witness: May I add to that?

The Court: Yes.

Q. By Mr. Scully: Whatever your answer is.

A. And also the flotation on 48 hours later was much greater than in the night.

(Testimony of Thomas J. Gentle)

Q. What do you mean by that?

A. She had more freeboard.

Q. She was further above the surface of the water?

A. That is correct.

The Court: Could you see the float from your position on the tug?

The Witness: Yes, sir.

The Court: Before the mooring was made?

The Witness: Yes, sir.

Q. By Mr. Scully: What was her position with reference to flotation at that time? [210]

The Witness: She was quite low in the water.

Q. How much freeboard, if you can tell, did she have, approximately?

A. She didn't have more than approximately three inches at the most.

Q. How much did she have the next day when you saw her?

A. She ran about 8 or 10 inches above the water.

The Court: What about this part, Mr. Gentle,—you say there was something built on the float?

The Witness: This iron ring that we have been talking about in court here was bulkheaded up on four sides by two 4 by 4's.

The Court: Did that bulkheading appear to have been done just recently? When were you there, the next day?

The Witness: 48 hours later, our next shift.

The Court: And you saw it then?

The Witness: Yes, sir.

The Court: What appearance did it have as to the building up there?

(Testimony of Thomas J. Gentle)

The Witness: It was evidently put on there so that it would guard against the ring making any damage, I suppose. That is what my interpretation was.

The Court: Was that on there the night of the accident?

The Witness: No, sir.

The Court: Could you see that ring protruding there? [211]

The Witness: Yes, sir. May I add something or not?

The Court: You proceed to question him, Mr. Scully.

Q. By Mr. Scully: Describe the appearance of the float in respect to the moss that you said you saw when you inspected the float.

A. The moss was the long hairy type of moss, extending clear up to the top and over the edge onto the deck, we will say, of the float.

Q. What, in your opinion, would cause the collection of that moss as you observed it on that particular float?

A. There would be only two reasons that I can think of for that moss; one would be the lack of flotation of the float itself, the other one the fouling of the chain in an anchor or some obstructions on the bottom.

Q. What will cause lack of flotation in a mooring float of that type under those conditions?

A. Water—soaking.

The Court: If it becomes waterlogged it will not have as much flotation?

The Witness: That is correct. Or using too small a mooring for the weight of chain that hangs beneath it.

Q. By Mr. Scully: You mean that the chain hanging beneath it would tend to drag a too small mooring down somewhat? A. That is correct, sir. [212]

Mr. Scully: You may cross-examine.

(Testimony of Thomas J. Gentle)

Cross-Examination

By Mr. Toner:

Q. Mr. Gentle, you said you had three years of experience on towboats?

A. I have had three years experience on towboats.

Q. That is speaking as of today?

A. As of today.

Q. How much experience did you have on towboats as of March 31, 1945? A. 90 days.

Q. You are familiar with the operation of the Rocona, are you not? A. Perfectly.

Q. Is there an engine control in the pilot-house?

A. No, sir.

Q. The engineer stays below to operate the engine control? A. That is right, sir.

Q. How does the captain indicate to the engineer what is to be done? A. We have a bell system, sir.

Q. What is the signal that is used to go from a slow bell to stop?

A. May I qualify this somewhat? [213]

Q. Yes, just explain it.

A. In the pilot-house, we had the throttle in the pilot-house, thereby eliminating the slow bell. The one bell would be the stop bell, you understand.

Q. And the captain when he wants to stop he rings one bell? A. That is right.

Q. And the engineer stops the engine?

A. That's right.

Q. How long does that take?

A. Do you mean the complete operation?

Q. Yes, from the time the captain decides—

A. Four to five seconds.

(Testimony of Thomas J. Gentle)

Q. Forty-five seconds? A. Four to five seconds.

Q. How long of a runoff is there on the engine?

A. I don't understand, sir.

Q. How long does the engine continue to run until it stops?

A. It has a brake, sir, and it stops immediately.

Q. How soon? A. Half a second.

Q. Half a second? A. It has a brake on it.

Q. When you were 100 or 150 or 200 feet away from the [214] mooring float and Captain Reeves indicated to the engineer that he should stop, at what speed did you say you were going?

A. He was running at a dead slow bell.

Q. Which would be what percentage of full speed?

A. I suppose 10 per cent, I guess. This is strictly a guess.

Q. How many speeds do you have, how many forward speeds do you have on the Rocona?

A. There is about 12 notches on the throttle.

Q. Full up is going full speed?

A. But like any type of throttle the first two or three or four notches are more—you can observe the speed increase more than you can the last couple. In other words, when she begins to get to the top of her R.P.M. then there is not much difference in the notches.

Q. In harbor work, towing one barge, is it normal to go at dead slow bell? Is that the normal speed?

A. No, sir.

Q. What is the normal speed?

A. Full speed, sir.

Q. And that would give you four knots?

A. Approximately four knots.

(Testimony of Thomas J. Gentle)

Q. And half speed would give you two knots, would it?

A. Well, it might, sir. I can't say for sure. [215]

Q. In any event you were going 'at a dead slow bell, which you have estimated at a half knot to three-quarters of a knot?

A. That's right.

Q. And Captain Reeves has estimated at three-quarters of a knot to one knot, is that correct?

The Court: You do not need to incorporate Captain Reeves' testimony.

Mr. Toner: Very well.

Q. By Mr. Toner: The distance of 100 or 150 or 200 feet from the mooring float, is that the distance from the bow of the barge to the mooring float, is that what you are referring to?

A. That is a hard question to answer. I really meant when a tug is first shut down she is approximately 100 to 150 feet off.

Q. How close to the mooring float did the tug pass?

A. Possibly 15, 20 feet, I would say.

Q. Was the tug about at the center line fore and aft of the barge when she was towing into the mooring float?

A. She will run off to one side. We were running just a little bit off to one side.

Q. Which side? A. To port.

Q. Were you running off a little to port? [216]

A. Yes.

Q. After the power was shut off of the Rocona she continued to maneuver the barge into the float, is that correct?

A. Yes.

Q. By periodically pulling slight tension on the lines?

A. That is correct.

Q. So she would keep the barge heading directly in a straight line?

A. That is true.

(Testimony of Thomas J. Gentle)

Q. As she had 'been heading before?

A. That's right.

Q. I believe you said the distance from the point you delivered the other barge to the Dispatch to the mooring float was about a mile, is that correct?

A. I believe it was. That is strictly a guess.

Q. When was the first time you saw the mooring float that night? A. When she came alongside.

Q. You didn't see it until she was about 15 or 20 feet?

A. That is right. I never even looked for it.

Q. Was the float visible when you looked at the barge after mooring her?

A. I didn't see it. I didn't look.

Q. You didn't pay any attention? [217]

A. I didn't pay any attention.

Q. Did you circle the barge?

A. I know we circled the barge, but outside of that I don't—

Q. You don't remember seeing the float?

A. No.

Q. Is it customary in coming up to these mooring floats to have the barge at almost a dead stop?

A. With only just slight way on.

Q. When you saw the mooring float 48 hours later that was the same time Tomasic saw it? Was he with you at that time?

A. We were in the same crew.

Q. Was the mooring float right side up or upside down? A. The mooring float was right side up.

Q. Right side up?

A. Yes. And not usable, but ready for use.

Q. And the moss on the top of it hadn't been disturbed? A. No, sir.

(Testimony of Thomas J. Gentle)

Q. But there were these new 4 by 4's on it?

A. Yes.

Q. Was the moss disturbed at the point where they put on the 4 by 4's?

A. There was no moss to speak of where they put it on. It went up to the edge. [218]

Q. It wasn't on the top? A. No.

Q. It was on the sides? A. That is right.

The Court: Read that, please.

(The record was read.)

The Court: On the sides of what?

The Witness: The float, sir, mooring.

The Court: On the sides of the mooring, do you mean the sides that extend down into the water?

The Witness: Yes.

The Court: What about the top of the float?

The Witness: It was more or less free of any moss. The moss came right up to the edge of the float, and there the majority of it stopped. There was slight moss, just streaks here and there.

The Court: There was very little moss on top of the float?

The Witness: Very little; very, very little.

The Court: There was some that came over the edges of the float?

The Witness: Just right up to the edge.

The Court: But you did not see any moss on what we will call the deck of the float?

The Witness: No. That moss, when it is on deck like [219] that, it is only in very tiny little smatches, like this "D" sitting out in here (indicating). It is extremely slippery.

(Testimony of Thomas J. Gentle)

Q. By Mr. Toner: 48 hours later the float was higher in the water? A. True.

Q. And she had some 8 or 10 inches of freeboard?

A. Yes, sir.

Q. That would indicate that the float was not waterlogged to you, wouldn't it? A. That would.

Q. Was it the same float?

A. That was the same float, to the best of my knowledge.

Q. It might have been another one.

A. It could have been, sure.

Q. Was it moored to the same place it was when you made the landing of the barge there?

A. The relative position was the same, yes.

Q. How many floats did they have there?

A. Three, sir.

Q. Did you see any scratches on the float?

A. No, sir.

Q. Did you see the damage to the bottom of 4414?

A. At a distance of 200 feet, yes, sir, approximately.
[220] We rode by on the tug, that is all.

Q. Was she capsized at the time? A. Yes, sir.

Q. You couldn't see the damage itself in detail, though? A. No, sir, not in detail.

Q. Did you talk to any of the employees of Guy F. Atkinson Company about this accident? A. Sure.

Q. Did they indicate to you that the Rocona had pulled the Barge 4414 over the float? A. Definitely.

Q. Was this a mooring in the usual course of events? Was there anything unusual about the mooring at all?

A. No, sir; it was strictly routine.

Q. And you didn't pay very much attention to a routine mooring, did you? A. Very little.

(Testimony of Thomas J. Gentle)

Q. What time were you expected to be in that night?

A. To tell you the truth, I don't even know what time it was.

Q. That was Saturday night?

A. In other words, only from the testimony I have heard here that I knew that it was 11:30 or 12:00 o'clock, whatever it was. I didn't even know what time it was.

Q. Tell me this, Mr. Gentle: When the tug was alongside [221] of the port side of the barge she was starboard side to the barge, wasn't she?

A. That is right, starboard side to.

Q. Was there any tension on the bridle?

A. No, sir; I think she was laying slack in the water.

Q. Did you have to keep the bridle up out of the way of the tug's propeller? A. We watch it.

Q. And it runs along the deck of the tug?

A. No; it runs over the side and we wind it up on the winch as we are ready to take the bridles off.

Q. If necessary to reduce the way on the barge can the tug at that point control the barge?

A. Yes, sir.

Q. Would the tug back down?

A. Back down. We have hooks on our rails that pick up the wire and she backs against them.

Q. Or if it is necessary to maneuver the tug ahead, the barge ahead, that can be done too, can't it?

A. Yes, she is free to do almost anything.

Mr. Toner: I believe that is all.

Mr. Scully: No further questions, your Honor.

That closes my testimony. The respondents and claimant rest.

Mr. Toner: The libelant rests, also. [222]

The Court: The witnesses may be excused, may they?

Mr. Toner: Certainly.

The Court: Will you gentlemen return at 2:00 o'clock? I want you to argue this case. How much time would you want?

Mr. Toner: I think possibly a half hour, possibly 15 or 20 minutes.

The Court: How much time will you want, Mr. Scully?

Mr. Scully: I think, your Honor, some place between half and three-quarters of an hour.

The Court: I do not think it should take any three-quarters of an hour.

Mr. Scully: Probably it won't take that long. When I said that I had in mind going into some of the cases for your Honor on it. Of course I have cited in my law memorandum filed with your Honor last week most of the cases, and it will be in your Honor's discretion whether you desire me to go into those cases in the oral argument, or whether your Honor merely wants the benefits of those citations for later investigation.

The Court: Isn't this a question of fact?

Mr. Scully: It is pretty much, I think so.

The Court: Isn't it entirely a question of fact?

Mr. Scully: Mr. Toner, as to that question of fact, may seriously rely on his previous indication that the burden of proof rests upon the respondents, which we can't understand even in the light of the cases Mr. Toner has cited, and [223] the comments made about them in later cases. I think, though, to answer your Honor's question directly, it is solely a question of fact as it may be influenced by whatever rule of law—

The Court: What have you to say about that, Mr. Toner?

Mr. Toner: The only serious question of law involved is the question of whether or not this is a bailment. We recognize that the cases—

The Court: Even if there is a bailment, then what?

Mr. Toner: If there is a bailment it is incumbent upon respondent to prove what happened, to explain what happened.

The Court: You mean the doctrine of *res ipsa loquitur* applies?

Mr. Toner: No. That ties in with our negligence case. We have three possible approaches to the case. The first is the theory of bailment; the second is the theory of negligence and direct proof of negligence; and the third is the doctrine of *res ipsa loquitur*.

The Court: As far as this situation is concerned here, is there any practical difference in the approach or consideration of the responsibility of the respondent, either under the doctrine of *res ipsa loquitur* or that of bailee?

Mr. Toner: The end result is the same.

The Court: That is what I was going to say, because the explanation in either one, while the burden of proof remains [224] with the plaintiff the burden of producing testimony would be placed upon the respondent and an explanation would have to be made.

Mr. Toner: That is correct. On the bailment theory we proceed via the *ex contractu* route, and in the *res ipsa loquitur* case we proceed on the theory of negligence or *ex delicto*.

Mr. Scully: Might I interpose at this point? Where you said an explanation would have to be made, first of all I don't say that that is our duty. If it is, then I don't regard the explanation to be made as meaning that the

person bearing the burden must show what caused it. They must show that they exercised due care, if they have the burden, they must show that the fault was absent.

The Court: If *res ipsa loquitur* applies it would be the highest degree of care.

Mr. Scully: That is definitely settled that that is not in this case. I am sure Mr. Toner will agree with me in this case. It has been settled by the cases that the highest degree of care in these carrier cases is not present.

Mr. Toner: They are not an insurer. They have to exercise that degree of care that is necessary under these particular circumstances.

The Court: That would be ordinary care used under the same circumstances. [225]

Mr. Toner: Yes.

The Court: Then even if *res ipsa loquitur* applies, then in this situation the highest degree of care is not the measure of respondent's responsibility?

Mr. Toner: Unless we can convince the court that the tug is a bailee for hire under these circumstances.

Mr. Scully: Even then it doesn't apply, Mr. Toner, under your own cases. You must remember those cases that say that.

Mr. Toner: If the situation here is that of a bailment for hire there is a greater degree of care necessary, I feel.

In discussing this *res ipsa loquitur* situation, I would like to add the case of *Johnson v. the United States*, which we had the pleasure of taking to the Circuit Court of Appeals, and in that case stress was laid upon the exclusiveness of control, and I understand that the case was argued in the Supreme Court a few days ago, and the government has issued a bulletin saying that there was probably a reversal on its way, because of the showing

that there was no possibility of any injury except through the negligence of the respondent.

There are a number of cases that I should like to add to our pre-trial memorandum on the theory of *res ipsa loquitur*.

Mr. Scully: I might say on this point of *res ipsa loquitur*, your Honor, that the doctrine is not available to one who pleads specific negligence. He thereby puts *res* [226] *ipsa loquitur* out of the case. Mr. Toner has said, of course, as he would have to if he relies upon it, that it applies to his second cause of action, counting on negligence, and there the court will find very specific allegations of negligence. By his own pleading, and it is only consistent with the same attempts of the libellant here to gather any theory that might possibly sustain liability, that he now raises *res ipsa loquitur* as having anything to do with this case.

The Court: I will try to look over these authorities more fully. I glanced over them before the trial. I had very little time.

Mr. Toner: May I add—

The Court: Mr. Toner, the court will not have very much time between now and 2:00 o'clock. If you want to add additional cases maybe you had better have them in here. Is there any one case?

Mr. Toner: Yes. *Jesionowski v. Boston & Maine R. R.* is the most recent statement of the Supreme Court. It is at, 67 Supreme Court—

The Court: Do you have it in the U. S.—

Mr. Toner: I have the Advance Sheet here if it will help the court.

The Court: Just leave it here.

Mr. Scully: May I take the case to get its identification? All I have is this peculiar name. [227]

Mr. Toner: It is 91 L. Ed. Advance opinion 533, decided January 13, 1947.

The Court: Court will now recess until a quarter after two. Return at a quarter after two.

(Whereupon, at 12:15 o'clock p. m. a recess was taken until 2:15 o'clock p. m. of the same day.) [228]

Los Angeles, California, Wednesday, December 17, 1947.
2:15 P. M.

The Court: You may proceed, Mr. Toner.

(Argument of counsel reported but not transcribed.)

The Court: We have here a situation in which the libelant depends upon circumstantial evidence to prove libelant's case, and we have also his claim of the inference arising from the doctrine of *res ipsa loquitur*.

Certainly there has been a great deal of evidence on the question of the physical facts, and upon those physical facts the libelant claims that the inference is that the damage was caused through and by the actions of the respondent, and that the respondent had sole charge of the barge at the time the damage was caused.

We have, on the other hand, the evidence of the respondent as to what actually happened at the time. That is, the witnesses on behalf of respondent have testified as to what they did and what they observed at the time the mooring was accomplished.

I think it is a question of fact for the court to decide here. Even if there is an inference caused by *res ipsa loquitur*, that inference is to be weighed with other evidence on behalf of libelant as against the evidence presented by respondent.

that there was no possibility of any injury except through the negligence of the respondent.

There are a number of cases that I should like to add to our pre-trial memorandum on the theory of *res ipsa loquitur*.

Mr. Scully: I might say on this point of *res ipsa loquitur*, your Honor, that the doctrine is not available to one who pleads specific negligence. He thereby puts *res* [226] *ipsa loquitur* out of the case. Mr. Toner has said, of course, as he would have to if he relies upon it, that it applies to his second cause of action, counting on negligence, and there the court will find very specific allegations of negligence. By his own pleading, and it is only consistent with the same attempts of the libellant here to gather any theory that might possibly sustain liability, that he now raises *res ipsa loquitur* as having anything to do with this case.

The Court: I will try to look over these authorities more fully. I glanced over them before the trial. I had very little time.

Mr. Toner: May I add—

The Court: Mr. Toner, the court will not have very much time between now and 2:00 o'clock. If you want to add additional cases maybe you had better have them in here. Is there any one case?

Mr. Toner: Yes. *Jesionowski v. Boston & Maine R. R.* is the most recent statement of the Supreme Court. It is at, 67 Supreme Court—

The Court: Do you have it in the U. S.—

Mr. Toner: I have the Advance Sheet here if it will help the court.

The Court: Just leave it here.

Mr. Scully: May I take the case to get its identification? All I have is this peculiar name. [227]

Mr. Toner: It is 91 L. Ed. Advance opinion 533, decided January 13, 1947.

The Court: Court will now recess until a quarter after two. Return at a quarter after two.

(Whereupon, at 12:15 o'clock p. m. a recess was taken until 2:15 o'clock p. m. of the same day.) [228]

Los Angeles, California, Wednesday, December 17, 1947.
2:15 P. M.

The Court: You may proceed, Mr. Toner.

(Argument of counsel reported but not transcribed.)

The Court: We have here a situation in which the libelant depends upon circumstantial evidence to prove libelant's case, and we have also his claim of the inference arising from the doctrine of *res ipsa loquitur*.

Certainly there has been a great deal of evidence on the question of the physical facts, and upon those physical facts the libelant claims that the inference is that the damage was caused through and by the actions of the respondent, and that the respondent had sole charge of the barge at the time the damage was caused.

We have, on the other hand, the evidence of the respondent as to what actually happened at the time. That is, the witnesses on behalf of respondent have testified as to what they did and what they observed at the time the mooring was accomplished.

I think it is a question of fact for the court to decide here. Even if there is an inference caused by *res ipsa loquitur*, that inference is to be weighed with other evidence on behalf of libelant as against the evidence presented by respondent.

If we had a jury here it would be a question of fact for [229] the jury to determine, in the opinion of the court. Likewise, it is the duty now of the court to determine the issue when it has no jury for the purpose of finding facts.

Now that you gentlemen each have heard the other side's testimony, do you think it would be of any benefit to you or to the parties that you represent to consider the possibility of a settlement of this case? It is for the court to determine it and I am ready to determine it; but if you think that it is a matter that you might settle, you would be able to do something that the court could not do, you could reach a compromise on it. I have to decide it all one way or the other. If you would like to have time to discuss it, say, until tomorrow morning, it will be satisfactory to the court. If you do not, it is likewise satisfactory to the court. It won't make any difference to the court whether you do or do not. My idea will be just the same, but it is a question of fact, as I view it, and it is always possible for the court to make a mistake on a question of fact. I am ready to decide it or I am willing to let you have some time for consideration of it if you wish, let us say until tomorrow morning.

(Discussion between court and counsel reported but not transcribed.)

The Court: Will you gentlemen return in the morning at half past nine?

(Whereupon, at 3:40 o'clock p. m. Wednesday, December 17, 1947, an adjournment was taken until 9:30 o'clock a. m., Thursday, December 18, 1947.) [230]

Los Angeles, California, Thursday, December 18, 1947.

10:00 A. M.

The Court: I suppose you gentlemen were unable to agree upon anything in regard to this case?

Mr. Toner: That is correct.

Mr. Scully: That is correct.

The Court: The court is ready to decide it, as it was yesterday afternoon. I had Mr. Goldstein read some parts of the record so as to be sure that my recollection was correct as to certain portions of the testimony, and in my opinion this accident was caused through the negligence of the respondent. I think the libelant should recover.

The court reached this conclusion from all the evidence. I think that the circumstances, the physical facts, speak louder than the words of the witnesses in this instance.

It has been agreed that this should be referred to a special master, is that correct?

Mr. Toner: That is correct. Unless we can stipulate as to damages. Does counsel feel—

Mr. Scully: I don't care to make any statement about that at this time, counsel, because of the fact that I will have to consider this. We probably will take this thing up. In any event, whatever that decision is, I will have to go over the items in the file and talk to you later about any possible stipulation. [232]

Mr. Toner: In that event an interlocutory decree would be in order and a reference to a master.

Mr. Scully: I don't think I should be asked at this time, Mr. Toner, to stipulate to the damages.

Mr. Toner: I am not asking that. I was just sounding out the possibility of trying to avoid the extra expense and difficulty of a reference.

Mr. Scully: I don't say it is impossible. I just don't want to commit myself at this time.

Mr. Toner: I appreciate the situation.

The Court: Would you want the court to wait a short time before making any order of reference? As I recall the stipulation, it was that in the event the court should find in favor of the libelant there was to be a reference.

Mr. Toner: That is correct. The court is correct in that.

Mr. Scully: I would appreciate it if your Honor would hold such order until possibly Monday.

Mr. Toner: It will be incumbent upon us to prepare the interlocutory decree anyway, and we can hold that until such time as counsel finds convenient.

The Court: The court has indicated its ruling and will withhold the making of a definite order until I hear from Mr. Scully.

Mr. Toner: All right. [233]

The Court: I won't be here Monday, Mr. Scully, but I will be back right after Christmas. I am going to Fresno Sunday.

Mr. Toner: I think by sometime after Christmas we can determine between us as to whether or not an interlocutory decree and order for reference is the advisable course, or whether a stipulated decree is the advisable course.

The Court: Of course, if you agree as to the amount of the damages, that does not in any way bind the respondent as to the question of liability. It would just be in order to save the time and expense of a reference. If it

is a matter that may be determined, it should be determined without the cost of a reference. If you can agree upon the amount the court will simply make an order for judgment for the libelant in a certain amount. Then, of course, the respondent would have a right to appeal from the judgment of the court.

Mr. Scully: That is what I want to leave open, the right to appeal from the decision on the question of liability, if your Honor please. If I stipulated damages I wouldn't want to foreclose any right in that event.

The Court: That would not do that.

Mr. Toner: Counsel would have three months to appeal from the final decree and 15 days to appeal from the interlocutory decree. That would be the only difference.

The Court: If you can agree on the amount of damages, [234] I think it is much better.

Mr. Toner: Very well. Does the court care to have the case set over for a certain day, then?

The Court: No. I have already indicated what my ruling will be. I will just wait until I hear from Mr. Scully as to whether or not you have agreed upon the amount of the damages. If you have not agreed upon that amount, the court will make the order in accordance with the stipulation that was entered into, at least the pre-trial stipulation. Is that clear to everyone?

Mr. Scully: Yes.

Mr. Toner: It is very clear.

The Court: Court is now recessed.

[Endorsed]: Filed Feb. 18, 1948, Edmund L. Smith, Clerk. [235]

[Endorsed]: No. 11885. United States Circuit Court of Appeals for the Ninth Circuit. The Tug "Rocona," Johnson Western Company and Case Connolly Company, Appellants, vs. Guy F. Atkinson Company, Appellee. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 19, 1948.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11885

The Tug ROCONA, Her Engines, Tackle, Apparel and
Furniture, JOHNSON WESTERN COMPANY, a
corporation, and CASE CONNOLLY COMPANY,
a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPEL-
LANTS INTEND TO RELY ON APPEAL

Appellants, the Tug Rocona, her engines, tackle, apparel and furniture, Johnson Western Company, a corporation, and Case Connolly Company, a corporation, intend to rely upon the points stated in their Assignment of Errors on appeal herein, which Assignment of Errors is a part of and is contained in the typewritten Transcript of Record certified by the Clerk of the District Court, and appellants incorporate their Assignment of Errors and the full contents thereof herein the same as though fully set forth at length.

Dated: March 17, 1948.

HILL, MORGAN & FARRER

By William S. Scully

Proctors for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION RE: USE OF ORIGINAL
EXHIBITS ON APPEAL

Whereas, on February 17, 1948 the United States District Court for the Southern District of California, Central Division, in Admiralty, No. 6936-B allowed an appeal from the Interlocutory Decree and Order of Reference entered in said Court in an action wherein the above named appellee is libellant, and the above named appellants are respondents and claimant, and

Whereas, the record on said appeal is shortly to be transmitted to the above entitled Court for necessary action in the matter of printing Apostles on Appeal,

Now, Therefore, It Is Hereby Stipulated, by and between the above named parties, through their respective proctors, that all exhibits received in evidence at the trial in District Court may be used by the above entitled Court in connection with said appeal, in their original form, unattached to the record, and need not be printed in the said Apostles on Appeal.

It Is Further Stipulated, that this Stipulation may be printed in and become a part of the said Apostles on Appeal.

Dated at Los Angeles, California, February 18, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS and GREENE
HAROLD A. BLACK, and
GEORGE E. TONER

By George E. Toner
Proctors for Appellee

HILL, MORGAN & FARRER

By William S. Scully
Proctors for Appellants

It Is So Ordered, in conformity with the foregoing
Stipulation.

Dated at San Francisco, California, March 19, 1948.

FRANCIS A. GARRECHT

Justice of the United States Circuit Court of Appeals
for the Ninth Circuit

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.

